CLERK'S COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 34

THE UNITED STATES OF AMERICA, PETITIONER

vs.

RAYMOND WOOD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED APRIL 20, 1936

CERTIORARI GRANTED MAY 25, 1936

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No.

THE UNITED STATES OF AMERICA, PETITIONER

vs.

RAYMOND WOOD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Record from Police Court of District of Columbia	1	1
Caption [omitted in printing]	1	1
Docket entries	1	1
Information	2	1
Motion for new trial	4	3
Bill of exceptions and order settling same	5	4
Bond on writ of error [omitted in printing]	9	6
Writ of error	13	6
Proceedings in United States Court of Appeals for District of Columbia	14	7
Stipulation as to sole assignment of error	14	7
Minute entry of argument	17	7
Opinion, Groner, J	18	8
Dissenting opinion, Robb, J	23	13
Judgment	25	16
Designation of record	26	16
Clerk's certificate [omitted in printing]	28	16

59532—36——1

1 In Police Court of the District of Columbia

No. 375266. November Term, 1935

Information for larceny

UNITED STATES

vs.

RAYMOND WOOD

[Caption omitted]

Docket entries

November 25, 1935. Information filed. #1. Elizabeth A. Williams. Schuldt, Judge. #2. Raymond Wood. McMahon, Judge. #2:

December 17, 1935. Continued to Jan. 7, 1936. Request of defense.

January 7, 1936. Continued to Jan. 20, 1936. Not reached.

January 20, 1936. Verdict—Guilty. Continued to Jan. 25, 1936.

January 23, 1936. Motion for new trial filed. Set for hearing Jan. 25, 1936.

January 25, 1936. Continued to Jan. 30, 1936. Request of Court.

February 1, 1936. Motion for new trial overruled. Continued to February 3, 1936.

February 3, 1936. Judgment Guilty. 240 days. Committed. Exceptions noted. Notice given of applying to the Court of Appeals for a Writ of Error. Appeal Bond $500.

February 4, 1936. Appeal Bond given, $500, J. W. Stewart, surety.

February 5, 1936. Bill of Exceptions submitted.

February 11, 1936. Bill of Exceptions settled, signed, sealed, and filed.

February 18, 1936. Copy of record and proceedings in this case, together with Writ of Error, sent to Court of Appeals in obedience to said Writ.

2 In Police Court of the District of Columbia

Information

Filed Nov. 25, 1935

DISTRICT OF COLUMBIA, *ss:*

Leslie C. Garnett, Attorney of the United States in and for the District of Columbia, who, for the said United States, prosecutes in this behalf, by Arthur J. McLaughlin, Esquire, one of his assistants, comes here into Court, at the District aforesaid, on the 25th day of November, in the year of our Lord, one thousand nine

hundred and thirty-five, in this said Term, and for the said United States, gives the Court here to understand and be informed, on the oath of one Joseph F. Bargani that one Elizabeth A. Williams and one Raymond Wood, each late of the District aforesaid, on the 22nd day of November in the year of our Lord one thousand nine hundred and thirty-five, with force and arms, at the District aforesaid, and within the jurisdiction of this Court, three dresses, all of the value of 17 dollars and 83 cents, all lawful money of the said United States, of the goods, chattels, moneys, and property of The Palais Royal, Inc., a body corporate; then and there being, feloniously did steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace and Government of the United States of America.

Whereupon, the said Attorney of the United States, who, in this behalf, prosecutes for the said United States, in manner and form as aforesaid, prays the consideration of the Court here in the premises, and that due proceedings may be had against the said Elizabeth A. Williams and Raymond Wood in this behalf to make them answer to the said United States touching and concerning the premises aforesaid.

LESLIE C. GARNETT,
Attorney of the United States
in and for the District of Columbia.
(Signed) ARTHUR J. MCLAUGHLIN,
His said Assistant.

Personally appeared Joseph F. Bargani before me this 25th day of November, A. D. 1935, and being duly sworn according to law, doth declare and say that the facts as set forth in the foregoing information are true.

(Signed) ARTHUR J. MCLAUGHLIN,
Assistant Attorney of the United States
in and for the District of Columbia.

3 [File endorsement omitted.]
#1. Schuldt, Judge.
#2. McMahon, Judge.
No. 357266.

UNITED STATES
vs.
ELIZABETH A. WILLIAMS; RAYMOND WOOD

LARCENY

Witnesses: Jos. F. Bargani, Palais Royal; James E. Kane, #1; E. E. Thompson, #1; Atty. Miller.
Nov. 25, 1935.
#2. Plea Not Guilty. Jury trial demanded. Cont'd 12/17/35.
#2. Bond, 300, J. W. S.

#1. Plea Not Guilty. Jury trial waived. Judgment Guilty. 60 days—committed. Term continued.
#2. Dec. 17, 1935. Cont. 1/7/36. Request of defense.
Jan. 7, 1936. Cont'd to 1/20/36. Not reached.
#2. Jan. 20, 1936. Verdict—Guilty. Cont'd to 1/25/36.
Jan. 23, 1936. Motion for new trial filed. Set for hearing 1/25/36.
Jan. 25, 1936. Cont'd to 1/30/36. Request of Court.
Feb. 1, 1936. Motion for new trial overruled. Cont'd to 2/3/36.
#2. Feb. 3, 1936. Judgment Guilty. 240 days. Committed. Exceptions noted. Notice given of applying to the Court of Appeals for a Writ of Error. Appeal Bond, $500.
Feb. 4, 1936. Appeal Bond $500 given. J. W. Stewart surety.
Feb. 5, 1936. Bill of Exceptions submitted.
Feb. 11, 1936. Bill of Exceptions settled, signed, sealed, and filed.

4 In Police Court of the District of Columbia

[Title omitted.]

Motion for a new trial

Filed Jan. 23, 1936

Comes now the defendant by his attorney, Robert I. Miller, and moves the Court for a new trial; and for cause states the following:
1. That the verdict was contrary to law.
2. That the verdict was contrary to the evidence.
3. That the jury that determined the verdict was illegally constituted.
4. And for such other reasons and causes as may appear upon the argument of this motion.

(Signed) ROBERT I. MILLER,
Phone, National 2937. 503 D St. NW., D. C.

UNITED STATES ATTORNEY:

Please take notice that I shall set the foregoing motion for hearing on Saturday, January 25th, 1936, at 10 a. m., or as soon thereafter as counsel may be heard.

(Signed) ROBERT I. MILLER,
Attorney for Defendant.

Service of a copy of the foregoing acknowledged 1/23/36.

(Signed) A. J. MCLAUGHLIN,
United States Attorney.

[File endorsement omitted.]

5 In Police Court of the District of Columbia

No. 375266

UNITED STATES

vs.

RAYMOND WOOD

Bill of exceptions

Filed Feb. 11, 1936

Be it remembered: That at the trial of this case before the Honorable John P. McMahon, one of the Judges of the Police Court, and a jury in the United States Branch of the Police Court of the District of Columbia, the United States being represented by Arthur J. McLaughlin, Esquire, Assistant United States Attorney, and the defendant by Robert I. Miller, Esquire, the following proceedings were had:

On the 22nd day of November 1935 an information was filed in the Police Court against the defendant, Raymond Wood, by the United States, by an Assistant United States Attorney, and prosecuted in the name of Leslie C. Garnett, Esquire, Attorney for the United States, *in and for* the District of Columbia. The said information charged the defendant, Raymond Wood, with the larceny in the District of Columbia of three dresses of the value of eighteen ($18.00) dollars, from the Palais Royal, a corporation, on the 22nd day of November 1935 against the peace and Government of the United States of America. The defendant entered a plea of not guilty to the charge contained in the Information and demanded a trial by jury.

Thereupon, on the 20th day of January 1936 in order to try the issues jointed herein, twelve prospective jurors were called to be examined on their voir dire, before the Honorable John P. McMahon, one of the Judges of the Police Court. Whereupon, at the request of counsel for the defendant, the Court inquired if any of the said twelve prospective jurors were notaries public, or whether they had Government contracts or were employed by the United States or the District of Columbia, or were war veterans, or received a bonus or pension from the Government, to which inquiries, prospective juror

6 Frank Johnson answered that he is the holder of a bonus certificate; prospective juror Robert E. Davison answered that he is employed as a clerk at the United States Weather Bureau; prospective juror Norman H. Smith answered that he is employed as a clerk at the Federal Emergency Relief Administration; prospective juror Oscar Kibbey answered that he is employed as a Clerk in the United States Treasury Department; prospective juror Benjamin P. Johnson answered that he is employed as a clerk at the United States Navy Yard; and prospective juror Sarah Giles

(a housewife) answered that she received a Civil War Pension. Whereupon the United States through its Assistant United States Attorney announced that it was satisfied. Whereupon counsel for the defendant challenged each of the above named prospective jurors individually and collectively, for cause, upon the ground that each of the said prospective jurors had an interest in the United States Government, which disqualified them to sit in the trial of a criminal cause, to which the United States was a party, which said challenge was disallowed by the Court, whereupon counsel for the defendant noted an exception and gave notice of his intention to apply to the United States Court of Appeals for a Writ of Error. Thereupon the United States through its Assistant United States Attorney again announced that it was satisfied with the jury, and counsel for the defendant then exhausted his three peremptory challenges by striking prospective jurors Frank Johnson, Robert E. Davison, and Norman H. Smith. Three other prospective jurors were called to take the places of the three they excused; and thereupon the Government, through its Assistant United States Attorney, then announced that it was satisfied wih the jury, whereupon counsel for the defendant again challenged for cause, upon the same grounds, the said Sarah Giles, Oscar Kibbey, and Benjamin P. Johnson, which challenge was disallowed by the Court, to which counsel for the defendant noted an exception and gave notice of his intention to apply to the United States Court of Appeals for a Writ of Error. Thereupon the jury, which included as members thereof the said Sarah Giles, Oscar Kibbey, and Benjamin P. Johnson, was sworn to try the issues over the objection and exception of counsel for the defendant.

7 On the 20th day of January 1936 a verdict of guilty as charged was returned by the jury.

The Government adduced substantial evidence to support the charge in the information and the verdict of the jury. No evidence was offered on behalf of the defendant. Counsel for the defendant thereupon gave notice of his intention to file a motion for a new trial.

A motion for a new trial was duly filed, and on the 3rd day of February 1936 was overruled; whereupon the defendant was sentenced to two hundred forty days. Thereupon counsel for the defendant noted an exception and gave notice of his intention to apply to the United States Court of Appeals for a Writ of Error.

And the Court hereby certifies that the foregoing is the substance of the proceedings bearing upon the exceptions herein reserved on behalf of the defendant.

The defendant now tenders this, his Bill of Exceptions herein, and prays that the same may be signed and sealed, enrolled and made a part of the record in this cause, nunc pro tunc, this 11th day of February, A. D. 1936, which is accordingly done.

Given under my hand and seal the day and year aforesaid.

(Signed) JOHN P. MCMAHON,
Judge, United States Branch Police Court, D. C.

8 [File endorsement omitted.]

9 [Bond on writ of error for $500.00 omitted in printing.]

13 *Writ of error*

UNITED STATES OF AMERICA, *ss:*

The President of the United States

To the Honorable JOHN P. McMAHON,
Judge of the Police Court of the District of Columbia.

Greeting: Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Police Court, before you, between United States, Plaintiff, and Raymond Wood, Defendant, Information No. 375266, a manifest error hath happened, to the great damage of the said Defendant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Court of Appeals for the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable George E. Martin, Chief Justice of the said Court of Appeals, the 14th day of February, in the year of our Lord one thousand nine hundred and thirty six.

[SEAL] HENRY W. HODGES,
Clerk of the United States Court of Appeals
of the District of Columbia.
By MONARCH BURKE,
Deputy Clerk.

Allowed by:
D. LAWRENCE GRONER,
Associate Justice of the United States Court of Appeals
for the District of Columbia.

14 Addition to record per stipulation of counsel.

In United States Court of Appeals for the District of Columbia

No. 6646

RAYMOND WOOD, PLAINTIFF IN ERROR

v.

THE UNITED STATES

Stipulation as to sole assignment of error

(Filed Feb. 24, 1936)

It is hereby stipulated by and between counsel for the respective parties that the following shall be the sole assignment of error herein:

The Court erred in overruling defendant's challenges for cause to jurors Frank Johnson, Robert E. Davison, Norman H. Smith, Oscar Kibbey, Benjamin P. Johnson, and Sarah Giles, as disclosed by the Bill of Exceptions herein and the said Jury was thus improperly constituted in violation of the Constitution of the United States and the Fifth and Sixth Amendments thereof.

(Signed) ROBERT I. MILLER,
WILLIAM E. LEAHY,
WM. J. HUGHES, JR.,
Attorneys for Plaintiff in Error.

LESLIE C. GARNETT,
IRVIN GOLDSTEIN
Attorneys for Respondent.

15 [File endorsement omitted.]

16-17 In United States Court of Appeals for District of Columbia

[Title omitted]

Minute entry of argument

(March 6, 1936)

The argument in the above entitled cause was commenced by Mr. Robert I. Miller, attorney for plaintiff in error, and was continued by Mr. William J. Hughes, Jr., attorney for plaintiff in error, and was continued by Mr. Irvin Goldstein, attorney for defendant in error, and was concluded by Mr. William E. Leahy, attorney for plaintiff in error.

18 In United States Court of Appeals for the District of Columbia

No. 6646

RAYMOND WOOD, APPELLANT

v.

THE UNITED STATES, APPELLEE

Appeal from the Police Court of the District of Columbia

Argued March 6, 1936—Decided March 25, 1936

Robert I. Miller, *William E. Leahy* and *William J. Hughes, Jr.*, all of Washington, D. C., for appellant.

L. C. Garnett, United States Attorney, and *Irvin Goldstein*, Assistant United States Attorney, both of Washington, D. C., for appellee.

Before MARTIN, C. J., and ROBB, VAN ORSDEL, GRONER, and STEPHENS, JJ.

Opinion

GRONER, J.: Appellant was convicted of petty larceny in the Police Court of the District of Columbia and sentenced to 240 days' confinement in jail. We shall call him defendant.

At his trial twelve prospective jurors were called. In their examination it was disclosed that one of them was the holder of a "bonus certificate"; another was a clerk in the United States Weather Bureau; another a clerk in the Federal Emergency Administration; another a clerk in the Treasury Department; and another a clerk in the Navy Yard. One was a Civil War pensioner. Counsel for defendant challenged each of these prospective jurors individually and collectively for cause on the ground that each had an interest in the United States which disqualified him to sit in the trial of a criminal case to which the United States was a party. The court disallowed the challenge. When the jury was finally impaneled and sworn, one of the twelve was a clerk in the Treasury Department, one a clerk in the Navy Yard, and one a recipient of a Civil War pension. All had been challenged for cause, both before and after the exhaustion of defendant's peremptory challenges. The case was tried. A motion for a new trial, urged on the ground that the jury was illegally constituted, was overruled and sentence imposed. We granted an appeal because of the importance of the question involved.

On the appeal the United States relies upon a recent statute—

Act of August 22, 1935 (Session Laws, 1st Sess., 74th Con-
19 gress, 1935, part I, p. 862), entitled, "An act to amend the law providing for exemptions from jury service in the District of Columbia." It reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 360 of title 18 of the Code of the District of Columbia of 1929, otherwise known as 'section 217 of the Code of Law for the District of Columbia', approved March 3, 1901, be, and the same is hereby, amended to read as follows:

"'All executive and judicial officers of the Government of the United States and of the District of Columbia, all officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard of the United States in active service, those connected with the police and fire departments of the United States and of the District of Columbia, counselors and attorneys at law in actual practice, ministers of the gospel and clergymen of every denomination, practicing physicians and surgeons, keepers of hospitals, asylums, almshouses, or other charitable institutions created by or under the laws relating to the District of Columbia, captains and masters and other persons employed on vessels navigating the waters of the District of Columbia shall be exempted from jury duty, and their names shall not be placed on the jury lists.

"'All other persons, otherwise qualified according to law whether employed in the service of the Government of the United States or of the District of Columbia, all officers and enlisted men of the National Guard of the District of Columbia, both active and retired, all officers and enlisted men of the Military, Naval, Marine, and Coast Guard Reserve Corps of the United States, all notaries public, all postmasters, and those who are the recipients or beneficiaries of a pension or other gratuity from the Federal or District Government or who have contracts with the United States or the District of Columbia, shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service: *Provided*, That employees of the Government of the United States or of the District of Columbia in active service who are called upon to sit on juries shall not be paid for such jury service but their salary shall not be diminished during their term of service by virtue of such service, nor shall such period of service be deducted from any leave of absence authorized by law. Approved, August 22, 1935.'"

Prior to the passage of this statute the provision with relation to the qualifications of a juror was that he should be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, able to read and write and understand the English language, and a person who had never been convicted of a felony or misdemeanor involving moral turpitude. In 1908 the Supreme Court held in Crawford v. United States, 212 U. S. 183, that an employee of the United States was not qualified to serve as a member of a petit jury in the District of Columbia in the trial of a criminal case. The effect of the decision and of others of like nature which followed, resulted, it is said, in narrowing the eligible list of jurors in the District to the point where it sometimes

became difficult to secure jurors possessing the necessary qualifications. To correct this, Congress extended the list of eligibles to include employees of the United States and of the District of Columbia, officers and enlisted men of the National Guard and of the Military, Naval, Marine, and Coast Guard reserve corps, notaries public, postmasters, and recipients of pensions and gratuities from the United States or the District, as well as those having contracts with the United States or the District; and the question we have to decide is whether this statute, when applied in a criminal case like the present, is in violation of the provisions of the Sixth Amendment guaranteeing to the accused in all criminal prosecutions the right of trial by an impartial jury. Stated otherwise, the question is whether defendant has been accorded a trial by an impartial jury within the meaning of the Sixth Amendment of the Constitution.

It is, of course, elementary that all the provisions of the Constitution are in all respects applicable to the District of Columbia. Callan v. Wilson, 127 U. S. 540, 550; Capital Traction Co. v. Hof, 174 U. S. 1, 5; Downes v. Bidwell, 182 U. S. 244. And in the Downes case the Court said:

"This District has been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the states of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and state governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Constitution."

It is equally elementary that the word "jury" and the words "trial by jury" and "impartial jury" should be construed with reference to the meanings they had in England and at the time of the adoption of the Constitution and Bill of Rights. Thompson v. Utah, 170 U. S. 343. The American colonists regarded the right to trial by jury—which, of course, means trial by an impartial jury—as "the most transcendent privilege which any subject can enjoy." They regarded their claim to it as the clear and inevitable result of their origin and historical development. "When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common

law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our State constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." 2 Story on the Constitution, § 1779.

At common law employees or servants of a party to a suit were disqualified as jurors on the theory of implied prejudice or bias. In Coke's Commentary on Littleton's Institute (p. 155), it is stated:

"He that is of a jury, must be liber homo, that is, not only a freeman and not bond, but also one that hath such freedom of mind as he stands indifferent as he stands unsworn."

And Blackstone defined a principal cause of challenge as one "where the cause assigned carries with it prima facie evident marks of suspicion either of malice or favour"—and this situation, he declared, exists as to jurors in all cases of the relation of master and servant. 3 Black. Com. 358.

Without more, therefore, it is safe to say that at common law the relationship of employer and employee worked an absolute disqualification, and this was equally true in this country at the time of the adoption of the Constitution. But it is insisted, on the part of the United States, that, since the right to establish qualifi-
21 cations for those who shall serve as jurors is, a matter entrusted to the state, it is within the exclusive power of the legislature to impose qualifications different from those recognized at common law. Thompson and Merriman on Juries, Sec. 23. That this is generally true in the states is uncontroverted; and so the United States says that the Congress, sitting as a legislature for the District of Columbia, may determine and declare what those qualifications shall be. But the answer to this is obvious for, though the Congress possesses over the District "the combined powers of a general and of a state government in all cases where legislation is possible"—Stoutenburgh v. Hennick, 129 U. S. 141, 147—there is, as was said in Callan v. Wilson, supra—"Nothing in the history of the Constitution or of the original amendments, to justify the assertion that the people of this District [District of Columbia] may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property—especially of the privilege of trial by jury in criminal cases."—And this brings us back to a consideration of the limitations contained in the Sixth Amendment which alone apply to the United States.

The elements constituting trial by jury have been frequently defined by the courts as comprising a jury of twelve, under the superintendence of a judge, and a unanimous verdict. But these particular elements are only partial and are no more important than the specific provisions in the Sixth Amendment that the trial shall be speedy and public, that the jury shall be impartial, that the accused shall be confronted by the witnesses against him, and shall

have compulsory process for obtaining his own witnesses, and the assistance of counsel. Any statute which destroys a single one of these substantial and essential features of the right to jury trial is violative of the provisions of the Amendment and offends a fundamental principle. The right to a jury of twelve and that its verdict shall be unanimous is no more sacred than the right that the jury shall be impartial. The precise point we have in mind—that is to say, that all the common law elements of jury trial are imbedded in the constitutional provisions and are beyond the authority of the legislative department to destroy or abridge—is asserted by Mr. Justice Sutherland in Patton v. United States, 281 U. S. 276. At page 290 he says:

"The foregoing principles, while not furnishing a precise basis for an answer to the question here presented, have the useful effect of disclosing the nature and scope of the problem, since they demonstrate the unassailable integrity of the establishment of trial by jury in all its parts, and makes clear that a destruction of one of the essential elements has the effect of abridging the right in contravention of the Constitution."

Unless, therefore, it can be successfully maintained that the Act does not destroy an essential element of defendant's constitutional rights, it must be condemned. There can be no doubt that the words used in the Sixth Amendment were intended primarily for the protection of the accused. Patton v. United States, supra. And likewise there can be no doubt that the purpose of the Amendment was to secure to the accused the absolute right to be tried by a jury free of bias or prejudice. Here defendant asserted his privilege in due time. He protested that the effect of the Act was to destroy his right to challenge for cause; that the Act forced him to inquire of each government employee whether in fact he was or was
22 not impartial, and to be bound by his answers, and thus—as he claims—to be tried by a jury which, by every standard of the common law, was not an impartial jury.

The question, therefore, is: Does the relationship of employee and employer in such a case necessarily imply bias?

The Supreme Court in the Crawford case (supra) said that bias is an elusive condition of the mind that is difficult, if not impossible, to recognize. And hence, as the Court also said, the law wisely implies that, with regard to some of the relations which may exist between the juror and one of the parties, bias is assumed and evidence of its actual existence need not be given. Among those of whom it is implied, Blackstone says are included the party's master, his servant, his counselor, and his steward. We know of no dissent to this general proposition in all the intervening period; and so now it is universally held not permissible to permit a clerk or employee of a private party to sit as a juror in a civil case. Indeed, the rule is that a very small or insignificant interest in the result of the trial is sufficient to disqualify a person from sitting as a juror. In short, wherever there appears to be any self-interest, that fact pro-

vides an absolute disqualification. The rule but recognizes the unalterable fact that our human nature inevitably looks with favor upon the side that supplies the means of existence. And it would seem, in fairness, that the rule should and ought to apply equally to an employee of the United States. But we have no need to rely upon our own views, or to set them forth at any length, for the Supreme Court in the Crawford case has foreclosed all doubt on that subject. There a druggist was called on the jury panel, and in his examination on the vior dire, stated he did not know the defendant and had formed no opinion about his case; that his drug store was a subpostal station; and that he was the clerk in charge, and was paid $300.00 a year by the United States as compensation, out of which he paid the rental of the premises and the other expenses. In other words, that he received a modest compensation from the United States for keeping on hand and selling postage stamps. Such a relationship is far less intimate than that sustained to the United States by the jurors challenged in the present case. Yet he was held incompetent, the Court saying:

"A jury composed of government employees where the government was a party to the case on trial would not in the least conduce to respect for, or belief in, the fairness of the system of trial by jury. To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such relation to either side as to lead on that account to any doubt on that subject."

And:—

"The position of the juror in this case is a good instance of the wisdom of the rule. His position was that of an employee who received a salary from the United States, and his employment was valuable to him, not so much for the salary as for the prospect such employment held out for an increase in his business from the people who might at first come to his store for the purchase of stamps, etc. It need not be assumed that any cessation of that employment would actually follow a verdict against the government. It is enough that it might possibly be the case, and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict."

23 The ruling made in that case was grounded, not on the statute then in effect, but upon the common law doctrine of qualification, (the court indicating that the statute did not assume to change the common law). But it is well settled, as above pointed out, that at the time of the adoption of the Constitution, the common law concept of qualification was embodied in the Constitution by the use of the phrase—in the Sixth Amendment—"an impartial jury". That same doctrine, as we have seen, exists today with equal force, and it is the duty of courts to give it effect and thus

preserve the right of an accused to trial by a constitutional jury. And so we think that there is no more right to remove the disqualification of employment in the case of the sovereign than to remove it in the case of the citizen. Whether in the one or the other, the inherent disqualification of interest is a positive bar.

It may well be that in the case now under consideration the presence of two employees of the government on the jury did not affect the result, but because this is or may be so in the present case is not conclusive of the question. It is just as likely that in the next case similar conditions will affect the conclusion. Can it be doubted that this would be true if an accused were on trial for counterfeiting and the jury trying him were composed of employees of the Treasury Department or the Department of Justice, or can it be doubted either that, if the government were condemning land for forts or arsenals and employees of the Navy or War Departments were on the jury, their personal interests might sway their judgment? These, and other like illustrations instantly suggest themselves and prove unanswerably the wisdom of the rule. But beyond all of these is the main consideration that the strength of the law is the respect of the people for the law; and there can be no respect for the law except in the recognition and enforcement of those basic principles of justice "which inhere in the very idea of free government" and which it was the object and purpose of the Bill of Rights to secure and protect.

In the District of Columbia more than a hundred thousand government employees will be qualified as jurors if the statute is valid. In the instant case, when called, they represented nearly half the panel. In other cases they may well represent the whole. It is not enough to say that they might discharge their duties fairly to the accused.—They must be omni exceptione majus.

Reversed.

Dissenting opinion

ROBB, J., dissenting: In the Crawford Case the court said: "We do not think that Sec. 215 of the [1901] code of the District includes the whole subject of the qualifications of jurors in that District. *If that section, together with Sec. 217, were alone to be considered, it might be that the juror was qualified.* But, by the common law, a further qualification exists. If that law remains in force in this regard in this District a different decision is called for from that made in this case. The common law in force in Maryland, February 27, 1801, remains in force here, except as the same may be inconsistent with or replaced by some provision of the code for the District. * * * It has not been contended that the common law upon the subject of jurors was not in force in Maryland at the above-
24 named date, or that it did not remain in force here, at least

up to the time of the passage of the code. Jurors must at least have the qualifications mentioned in Sec. 215, but that section does not, in our opinion, so far alter the common law upon the subject as to exclude its rule that one is not a competent juror in a case if he is master, servant, steward, counsellor or attorney of either party. In such case a juror may be challenged for principal cause as an absolute disqualification of the juror. * * *" [Emphasis supplied.]

It thus appears that the decision in that case was put upon the common law rule—there being no statutory provision inconsistent with that rule.

The question raised in the present case was not involved and, of course, not decided in that case. "If", said the court, "that section [Sec. 215], together with Sec. 217, were alone to be considered, it might be that the juror was qualified." (212 U. S. at p. 195.) But the court held that those sections must be read in conjunction with the common law so far as that law had not been altered thereby. It will not be denied that the Act of 1935, "to amend the law providing for exemptions from jury service in the District of Columbia", is in part inconsistent with the common law rule. Prior to that enactment, bias was conclusively implied as to those embraced within the provision of Sec. 217 of the Code exempting "all executive and judicial officers, salaried officers of the Government of the United States and of the District of Columbia." This conclusive implication of bias continues to apply to those embraced within the provision of the first paragraph of Sec. 217 as amended by the 1935 Act, exempting "All executive and judicial officers of the Government of the United States and of the District of Columbia." But the last paragraph of Sec. 217, as amended, overrides the implication of bias as to the persons covered by the last paragraph, and, if "otherwise qualified according to law", the amendment makes the persons affected "qualified to serve as jurors in the District of Columbia * * *."

In my view that provision is well within the Constitutional power of Congress. It removes the disqualification, according to the majority opinion, of more than 100,000 government employees. In point of intelligence, character, and general fitness for jury service, those employees rank high.

The judgment should be affirmed.

A true copy.
Test:

Clerk of the United States Court of Appeals
for the District of Columbia.

25 In United States Court of Appeals for District of Columbia

No. 6646. January Term, 1936

RAYMOND WOOD, PLAINTIFF IN ERROR

vs.

UNITED STATES

Judgment

(March 25, 1936)

In error to the Police Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Police Court of the District of Columbia and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Police Court in this cause be, and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said Police Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. JUSTICE GRONER.

MARCH 25, 1936.

Dissenting opinion by Mr. Justice Robb.

26 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Designation of record

(Filed April 2, 1936)

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

1. The Record.
2. Minute entry showing argument of cause.
3. Opinion of the Court, and dissenting Opinion of Mr. Justice Robb.
4. The Judgment.
5. This Designation.
6. Clerk's Certificate.

LESLIE C. GARNETT,
IRVIN GOLDSTEIN,
Attorneys for Defendant in Error.

Service of copy acknowledged this 2nd day of April, 1936.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, Jr.,
ROBT. I. MILLER,
Attorneys for Plaintiff in Error.

27 [File endorsement omitted.]

28 [Clerk's Certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1936

Order allowing certiorari

Filed May 25, 1936

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

75357—36

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	4
Specification of errors to be urged	5
Reasons for granting the writ	6

CITATIONS

Cases:	
Churchill v. *Churchill*, 12 Vt. 661	9
Commonwealth v. *Brown*, 147 Mass. 585	9
Crawford v. *United States*, 212 U. S. 183	7, 8
Dallas v. *Peacock*, 89 Tex. 58	9
Fellows's case, 5 Me. 333	9
Funk v. *United States*, 290 U. S. 371	9
Glassinger v. *Ohio*, 24 Ohio St. 206	9
Hayes v. *Missouri*, 120 U. S. 68	9
Johnson v. *United States*, 11 F. (2d) 606	6
People v. *Lange*, 90 Mich. 454	9
Smith v. *German Ins. Co.*, 107 Mich. 270	9
Spies v. *Illinois*, 123 U. S. 131	8
Stilson v. *United States*, 250 U. S. 583	8
Thompson v. *Commonwealth*, 88 Va. 45	9
Vause v. *United States*, 53 F. (2d) 346	7
Statutes:	
R. S. Sec. 800 (U. S. C., Title 28, Sec. 411)	6
Act of August 22, 1935, c. 605, 49 Stat. 682	2
Code of District of Columbia, Title 18, Sec. 360	4
Miscellaneous:	
House Report 1421, 74th Cong., 1st Sess	6
Senate Report 1297, 74th Cong., 1st Sess	6

61817—36

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND WOOD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia in the case of *Raymond Wood, Appellant* v. *United States* (Docket No. 6646), entered on March 25, 1936, reversing the judgment of the Police Court of the District of Columbia.

OPINIONS BELOW

No opinion was rendered by the Police Court. The opinion of the Court of Appeals (R. 8) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 25, 1936 (R. 16). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure In Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the Act of Congress removing the disqualification of Government employees and pensioners as jurors in the District of Columbia in cases in which the United States is a party contravenes the Sixth Amendment of the Federal Constitution.

STATUTES INVOLVED

Act of August 22, 1935, c. 605, 49 Stat. 682:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 360 of title 18 of the Code of the District of Columbia of 1929, otherwise known as "section 217 of the Code of Law for the District of Columbia", approved March 3, 1901, be, and the same is hereby, amended to read as follows:
>
> "All executive and judicial officers of the Government of the United States and of the District of Columbia, all officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard of the United States in active service, those connected with the police and

fire departments of the United States and of the District of Columbia, counselors and attorneys at law in actual practice, ministers of the gospel and clergymen of every denomination, practicing physicians and surgeons, keepers of hospitals, asylums, almshouses, or other charitable institutions created by or under the laws relating to the District of Columbia, captains and masters and other persons employed on vessels navigating the waters of the District of Columbia shall be exempt from jury duty, and their names shall not be placed on the jury lists.

"All other persons, otherwise qualified according to law whether employed in the service of the Government of the United States or of the District of Columbia, all officers and enlisted men of the National Guard of the District of Columbia, both active and retired, all officers and enlisted men of the Military, Naval, Marine, and Coast Guard Reserve Corps of the United States, all notaries public, all postmasters and those who are the recipients or beneficiaries of a pension or other gratuity from the Federal or District Government or who have contracts with the United States or the District of Columbia, shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service: *Provided,* That employees of the Government of the United States or of the District of Columbia in active service who are called upon to sit on juries shall not be paid for such jury service but their salary shall not be dimin-

ished during their term of service by virtue of such service, nor shall such period of service be deducted from any leave of absence authorized by law."

Approved, August 22, 1935.

Prior to the above amendment, Section 360 of Title 18 of the Code of the District of Columbia of 1929 read as follows:

> 360. *Exemption from jury service.*—All executive and judicial officers, salaried officers of the Government of the United States and of the District of Columbia, all officers and enlisted men of the National Guard for the District of Columbia, both active and retired, and those connected with the police or fire departments, counselors and attorneys at law in actual practice, ministers of the gospel and clergymen of every denomination, practicing physicians and surgeons, keepers of hospitals, asylums, almshouses, or other charitable institutions created by or under the laws relating to the District, captains and masters and other persons employed on vessels navigating the waters of the District shall be exempt from jury duty, and their names shall not be placed on the jury lists.

STATEMENT

Respondent Wood was tried in the Police Court of the District of Columbia under an information charging petty larceny (R. 1–2). At his trial twelve prospective jurors were called, of whom one was a housewife who received a Civil War pension,

one was the holder of a veteran's bonus certificate, and four were employees of the United States Government (R. 4–5). The respondent's challenges to these jurors, on the ground that each had an interest in the United States which disqualified him to sit in the trial of a criminal case to which the United States was a party, were disallowed. (R. 5.) Respondent exercised his three peremptory challenges (R. 5). The jury finally impaneled and sworn to try the respondent included a clerk in the United States Treasury, a clerk at the United States Navy Yard, and the Civil War pensioner (R. 5). Respondent was tried and convicted, and a motion for a new trial on the ground that the jury was illegally constituted was overruled and sentence of confinement in jail for 240 days was imposed (R. 5). On appeal, the Court of Appeals for the District of Columbia reversed the judgment, Robb, J., dissenting (R. 14).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding that the Act of August 22, 1935, is unconstitutional as contravening the Sixth Amendment.

2. In holding that Government employees and pensioners are disqualified by interest from acting as jurors in cases in which the United States is a party.

3. In reversing the judgment of the Police Court of the District of Columbia.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the District of Columbia has decided a constitutional question, in a manner which we believe to be erroneous, seriously affecting the administration of justice, and particularly the criminal law, in the District of Columbia. The decision below holds that Congress is without power to remove the common-law disqualification of employees and pensioners of the Federal Government as jurors in cases in which the United States is a party. In the District of Columbia, as the court below pointed out (R. 14), the status of more than 100,000 Government employees as eligible jurors is affected. In the court below respondent stated, as a fact of which the court might take judicial notice, that this number constituted approximately one-half of the total number of qualified jurors in the District. The statute in question was enacted in view of the fact that it had been "exceedingly difficult to obtain the best personnel on juries in the District" under the common-law disqualification. See Senate Report 1297, 74th Cong., 1st Sess.; House Report 1421, 74th Cong., 1st Sess.

While the constitutional question has particular importance for the District of Columbia, it is worthy of note that by a statute of general application the qualifications of jurors in the Federal courts are determined in accordance with the applicable state laws. R. S., Sec. 800, U. S. Code, Title 28, Sec. 411; *Johnson* v. *United States,* 11 F.

(2d) 606 (C. C. A. 5th); *Vause* v. *United States,* 53 F. (2d) 346, 355 (C. C. A. 2d).

2. We submit that the court below has applied the Sixth Amendment of the Federal Constitution in a manner neither required nor warranted by the decisions of this Court. Chief emphasis was placed upon *Crawford* v. *United States,* 212 U. S. 183. In that case this Court held that the then existing statute concerning jurors in the District of Columbia did not purport to abrogate the common-law rules of qualification; that the common law to be applied was, under the District of Columbia Code, the common law of Maryland in 1801; that under the common law the relationship of master and servant obtaining between a litigant and prospective juror served to disqualify the juror; and that this relationship existed where the prospective juror drew compensation from the United States for his services in conducting a postal substation in his place of business. The Court went on to observe that the facts of that case lent support to the wisdom of the common-law rule. It may be noted, as bearing upon the possibility of interest on the part of the juror, that the prosecution in that case was for conspiracy to defraud the United States in furnishing supplies to the Post Office Department. No constitutional issue was involved in the case and none was discussed. The extract from the opinion quoted in the dissenting opinion in the case at bar (R. 15) demonstrates that the Court in the *Crawford* case

was concerned only with the common-law rule. This is further shown by the following passage (212 U. S. at 194):

> There may be statutes in the different States as to qualifications of jurors *which in their construction would not prevent the application of the common law in regard thereto,* and so the question of qualification being the same in the Federal as in the state courts (Rev. Stat., Sec. 800; 1 Comp. Stat., p. 623), may be a general one. [Italics supplied.]

It was in the light of the *Crawford* decision that the statute in question was enacted.

That Congress and the courts are charged with the duty of preserving the right to an impartial jury which is guaranteed by the Sixth Amendment, no one will question. But we submit that the court below erred in holding that that Amendment prevents any alteration whatever in those subsidiary common-law rules which are but means for securing an impartial jury. As was said by this Court with respect to a similar question, "There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured." *Stilson* v. *United States,* 250 U. S. 583, 586. See also *Spies* v. *Illinois,* 123 U. S. 131, 168–170. It has never been held hitherto that the Sixth Amendment requires the perpetuation of absolute presumptions, or implications, of bias

based on relationship. Compare *Funk* v. *United States,* 290 U. S. 371. Similar constitutional provisions which have been adopted by all the States (*Hayes* v. *Missouri,* 120 U. S. 68, 69) have not prevented changes in the common-law rules of disqualification of jurors for consanguinity within the ninth degree, *Churchill* v. *Churchill,* 12 Vt. 661; for trivial pecuniary interest, *Commonwealth* v. *Brown,* 147 Mass. 585, 591; *Smith* v. *German Ins. Co.,* 107 Mich. 270; *Dallas* v. *Peacock,* 89 Tex. 58, 60; or for employment by the sovereign, *Fellows's case,* 5 Me. 333, 334–335; *People* v. *Lange,* 90 Mich. 454; *Glassinger* v. *Ohio,* 24 Ohio St. 206; *Thompson* v. *Commonwealth,* 88 Va. 45, 46.

The statute involved merely removes the absolute disqualification of Government employees and pensioners, which was previously a ground of challenge for principal cause, and leaves such persons subject to challenge for actual bias, as in the case of other prospective jurors. The reasonableness of this change, and its consistency with the requirement of an impartial jury, are evidenced by the application of the statute to the facts of the present case. The Government had no pecuniary interest in the case; its interest was solely that of the sovereign as keeper of the peace. The natural interest of the jurors in question would be that of citizens; none of them was employed by any interested Department; and the two who were employed as clerks presumably enjoyed the protection of civil

service status. A conclusive presumption of bias in such circumstances, we submit, can be negatived by statute without any impairment of the defendant's constitutional right to trial by an impartial jury.

Because of the importance and novelty of the question presented, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

APRIL, 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provision and statutes involved	2
Statement	5
Specification of errors to be urged	6
Summary of Argument	6
Argument:	
I. Factual Background of the Act and Effect of Its Provisions	9
II. If at Common Law the Crown Servant Were a Qualified Juror in Crown Cases, the Sixth Amendment Does Not Forbid a Disinterested Government Employee To Sit As Juror in Government Cases	19
III. At Common Law the King's Servants Sat on Juries in Crown Cases	21
1. *Introduction*	21
2. *The Commentators*	27
3. *The Cases*	38
4. *The Case of the Sheriff*	49
5. *American Views as to the Common Law*	51
6. *Government Employees Are Qualified Jurors in Government Cases Irrespective of the Act of August 22, 1935*	58
IV. Even Had the Common Law Forbidden a Crown Servant To Serve As a Juror in a Crown Case, the Act Does Not Impair an Essential Element of Trial by an Impartial Jury, And Thus Does Not Infringe the Sixth Amendment	59
1. *Federal Decisions under the Sixth and Seventh Amendments*	59
2. *Statutes and Decisions of the States*	68
V. The Act Does Not Deprive the Respondent of Due Process of Law	74
Conclusion	77

CITATIONS

Cases:

Anonymous, 1 Vent. 309, 3 Salk. 81, 86 Eng. Rpt. 199 ... 34, 43
Baltimore & Carolina Line v. *Redman*, 295 U. S. 654 ... 20
Blagney's Case, Cas. T. Hard, 202, 95 Eng. Rpt. 129 ... 27
Block v. *State*, 100 Ind. 357 ... 52, 53, 55, 61
Bradshaw v. *United States*, 15 F. (2d) 970 ... 65
Burns v. *State*, 12 Tex. Ct. App. 269 ... 56

Cases—Continued.

	Page
Carroll v. *United States*, 16 F. (2d) 951, certiorari dened, 273 U. S. 763	65
Cawthon v. *State*, 115 Fla. 801	55
Chapman v. *State*, 66 Tex. Crim. App. 489	55
City of Auburn v. *Paul*, 110 Me. 192	72
City of Prescott v. *Sumid*, 30 Ariz. 347	72
Clark v. *United States*, 289 U. S. 1	64
Coats v. *State*, 32 P. (2d) 955	56
Commonwealth v. *Brown*, 147 Mass. 585	72
Commonwealth v. *Dorsey*, 103 Mass. 412	72
Commonwealth v. *Maxwell*, 271 Pa. 378	65
Commonwealth v. *Ryan*, 5 Mass. 89	72
Continental Bank v. *Rock Island Ry.*, 294 U. S. 648	19
Corley v. *State*, 162 Ark. 178	55, 57
Crawford v. *United States*, 212 U. S. 183	7, 8, 52, 53, 54, 57, 58, 59, 60, 61, 69
Detroit v. *Detroit Ry. Co.*, 134 Mich. 11	72
Dimick v. *Schiedt*, 293 U. S. 474	20, 67
Edgar v. *State*, 59 Tex. Crim. App. 252	56
Evans v. *State*, 13 Ga. App. 700	57
Falter v. *United States*, 23 F. (2d) 420, certiorari denied, 277 U. S. 590	56, 65
Fellow's Case, 5 Me. 333	57
Gaff v. *State*, 155 Ind. 277	55
Gasoline Products Co. v. *Champlin Refining Co.*, 283 U. S. 494	20, 68
Glassinger v. *State*, 24 Ohio St. 206	57
Hankins v. *State*, 118 Ark. 419	55
Hayes v. *Missouri*, 120 U. S. 68	55, 68
Hildreth v. *City of Troy*, 101 N. Y. 234	72
Holt v. *United States*, 218 U. S. 245	65
Hopt v. *Territory of Utah*, 120 U. S. 430	65, 73
Hoxie v. *United States*, 15 F. (2d) 762, certiorari denied, 273 U. S. 755	65
Hunsdon v. *Baker*, Cro. Eliz. 663	41
Jackson v. *State*, 74 Ala. 26	57
Kentucky v. *Wendling*, 182 Fed. 140	66
King, The, v. *Edmonds*, 4 B. & Ald. 471, 106 Eng. Rpt. 1009	46
King v. *Jenney*, Keilw. 97, 72 Eng. Rpt. 261	28, 41
Kurczak v. *United States*, 14 F. (2d) 109	65
Ladd v. *State*, 17 Fla. 215	55
Lewis v. *United States*, 146 U. S. 370	63
Maddex v. *Columber*, 114 Ohio St. 178	72
Mana, In re, 178 Cal. 213	72
McNish v. *State*, 47 Fla. 69	56
Mingo v. *State*, 61 Tex. Crim. App. 14	56

Cases—Continued.

	Page
Murray's Lessee v. *Hoboken Land and Improvement Co.*, 18 How. 272	21
O'Conner v. *State*, 9 Fla. 215	57
Ownbey v. *Morgan*, 256 U. S. 94	21
Paschen v. *United States*, 70 F. (2d) 491	66
Pate v. *State*, 158 Ala. 1	56
Patton v. *United States*, 281 U. S. 276	20, 62, 63, 68
People v. *Cosmo*, 209 N. Y. 91	72
People v. *Lange*, 90 Mich. 454	57
Peterson, Ex parte, 253 U. S. 300	20, 62
Pikeville v. *Riddle*, 191 Ky. 231	72
Pointer v. *United States*, 151 U. S. 396	64, 69
Reg. v. *Blakeman*, 3 Carr. & Kir. 97, 175 Eng. Rpt. 479	42
Reg. v. *Tutchin*, 14 St. Tr. 1095	42
Regina v. *Lacey*, 3 Cox Cr. C. 517	47
Respublica v. *Mesca*, 1 Dall. 73	66
Rex v. *Edmonds*, 4 V. & Ald. 471	49
Rex v. *Genney*, Keilw. 102a, 72 Eng. Rpt. 266	42
Rex v. *Hampden*, 3 St. Tr. 823	43
Rex v. *Kirwan*, 31 St. Tr. 543	45
Rex v. *Parkyns*, 4 St. Tr. 627	44
Rex v. *Rowan*, 22 St. Tr. 1934	45
Rex v. *Sheppard*, 1 Leach C. C. 101	42
Reynolds v. *United States*, 98 U. S. 145	65
Robinson v. *Territory of Oklahoma*, 148 Fed. 830	55
Salinger v. *United States*, 272 U. S. 542	20
Schick v. *United States*, 195 U. S. 65	20
Scranton v. *Gore*, 124 Pa. 595	72
Slocum v. *New York Life Ins. Co.*, 228 U. S. 364	67
Smith v. *The German Ins. Co.*, 107 Mich. 270	72
Snyder v. *Massachusetts*, 291 U. S. 97	76
Spies v. *Illinois*, 123 U. S. 131	17, 65
Spiltorff v. *State*, 108 Ind. 171	56
State v. *Adams*, 20 Iowa 486	57
State v. *Carter*, 106 La. 407	57
State v. *Cosgrove*, 16 R. I. 411	57
State v. *Forbes*, 111 La. 473	56
State v. *Foster*, 150 La. 971	56
State v. *Galbraith*, 150 Wash. 664	57
State v. *Golubski*, 45 S. W. (2d) 873	55
State v. *Johnson*, 123 S. C. 50	55
State v. *Lewis*, 50 Nev. 212	56
State v. *Lewis*, 31 Wash. 75	57
State v. *McDonald*, 59 Kan. 241	57
State v. *Morgan*, 147 La. 205, certiorari denied, 253 U. S. 498	56
State v. *Parker*, 104 Vt. 494	56
State v. *Petit*, 119 La. 1013	55, 56, 57
State v. *Wright*, 53 Me. 328	57

Cases—Continued.

Page

Stilson v. *United States*, 250 U. S. 583 64
Stokes v. *People*, 53 N. Y. 164 73
Terrell v. *State*, 69 Ark. 449 55
Territory v. *Fukunga*, 30 Haw. 697 56
Thompson v. *Commonwealth*, 88 Va. 45 57
Tynan v. *United States*, 297 Fed. 177, certiorari denied, 266 U. S. 604 65
United States v. *Barber*, 21 App. D. C. 456 57
United States v. *Cartacho*, Fed. Cas. No. 14738 66
United States v. *Griffith*, 55 App. D. C. 123, 2 F. (2d) 925 .. 52
United States v. *Lee*, 15 App. D. C. 489 57
United States v. *McMahon*, 4 Cranch C. C. 573, 26 Fed. Cas. No. 15699 66
United States v. *Shipp*, 203 U. S. 563 64
Walker v. *New Mexico & Southern Pac. R. Co.*, 165 U. S. 593 ..... 20, 62, 67
Walter v. *People*, 32 N. Y. 147 72
Warner v. *Town of Gunnison*, 2 Colo. App. 430 72
Watson v. *North British Ry. Co.*, 38 Scot. Law Rep. 252 .. 26, 48
Williams v. *United States*, 46 F. (2d) 731 66
Wong Wing v. *United States*, 163 U. S. 228 66
Young v. *State*, 91 Tex. Crim. App. 511 56
Y. B. 19, Ass. 62, pl. 6 39
Y. B., 4 Henry VII 3, H. pl. 5 40
Y. B., 4 Henry VII 8, P. pl. 7 40
Zimmerman v. *State*, 115 Ind. 129 55

Statutes:

Act of August 22, 1935, c. 605, 49 Stat. 682 2
Code of District of Columbia of 1929:
Title 18, Sec. 357 11
Title 18, Sec. 358 12
Title 18, Sec. 360 ..... 4, 12
Revised Statutes, Sec. 800 69
Revised Statutes, Sec. 819 ..... 64, 65
6 Geo. IV, c. 50, sec. 26 50
33 Vict., c. 14, sec. 5 66
State Statutes:
Alabama Code, 1922, sec. 8664 72
Alabama Code, 1923, sec. 8610 72
Arizona, Revised Code 1928:
Sec. 1905 72
Sec. 5035 70
Sec. 5036 73
Arkansas, Crawford & Moses Digest 1921:
Sec. 3160 70
Sec. 3163 73
Sec. 6334 72
California Code of Civil Proc. 1931, c. 4, sec. 602 (5) .. 72

Statutes—Continued.
State Statutes—Continued.
Page
California, Penal Code:
Sec. 1074 ---- 72
Sec. 1076 ---- 73
California Penal Code of 1872, sec. 1074 ---- 70, 72
Colorado, Ann. Code Civ. Proc., sec. 199 ---- 72
Florida, Comp. Gen. Laws 1927:
Sec. 4359 ---- 72
Sec. 4451 (4) ---- 72
Georgia Code, 1933, sec. 59–715 ---- 72
Idaho, Code Ann. 1932, sec. 19–1920 ---- 70, 73
Illinois, Callaghan's Stats., c. 78, par. 14 ---- 73
Indiana, Burns' Ann. Stat. 1933, sec. 9–1504–4 ---- 73
Iowa, Code 1931, sec. 13830 ---- 70
Kentucky, Carroll's Code 1927, Crim. Code, sec. 210 ---- 70
Louisiana, Marr's Rev. Code of Practice, Ar. 507 (1) ---- 73
Maine Rev. Stat. 1930, c. 96, sec. 108 ---- 72
Massachusetts Ann. Laws, vol. 8, c. 234, sec. 30 ---- 72
Michigan Comp. Laws, 1929, sec. 14277 ---- 72
Minnesota, Mason's Stat., 1927, sec. 10738 ---- 70
Mississippi, Code 1930, sec. 30 ---- 73
Missouri, Rev. Stats. 1929, sec. 8771 ---- 73
Montana, 1895 Code, sec. 2051 ---- 73
Montana, Rev. Code 1921, sec. 11960 ---- 70
Nebraska, Comp. Stat. 1922, sec. 10134 ---- 73
Nevada, Comp. Laws 1929:
Sec. 10946 ---- 70
Sec. 10948 ---- 73
New Jersey Comp. Stat., vol. 3, sec. 39 ---- 72
New York Code Crim. Proc.:
Sec. 376 ---- 73
Sec. 377 ---- 69
North Dakota, Comp. Laws 1913:
Sec. 7616 ---- 73
Sec. 10810 ---- 70
Oklahoma, Comp. Stat. 1921, sec. 2676 ---- 70, 73
Oregon, Code Ann., sec. 2–207 ---- 73
Oregon, Ann. Code 1930, vol. 1, sec. 13–916 ---- 70
South Dakota, 9929:
Sec. 2502 ---- 73
Sec. 4857 ---- 70, 73
Tennessee, Williams' Code Ann. 1934:
Sec. 1990 ---- 73
Sec. 10008 ---- 73
Utah, Rev. Stat. 1933:
Sec. 104–24–10 ---- 73
Sec. 105–31–19 ---- 70

Statutes—Continued.

State Statutes—Continued.

	Page.
Vermont, Pub. Laws 1933, sec. 1237	73
Washington, Comp. Stat. 1922, sec. 331	73
Washington, 2 Rem. Rev. Stat., sec. 330	73
Wyoming, Rev. Stat. 1931, sec. 33–704	73
Miscellaneous:	
Archbold, King's Bench Practice, I	25
Archbold, Criminal Practice and Pleading (24th Ed.)	25
Bacon, Abridgment, V	24, 25, 36, 66
Bishop, New Criminal Procedure, II	73
Blackstone, Commentaries, III, IV	23, 24, 25, 64, 72
Bracton, De Legibus Angliae, folio 185a (Twiss Ed., III, 185)	22
Britton, I	22, 25
Brooke, Abridgment, Challenge	29
Budget Message, 1937	12
Chitty, Criminal Law, I	25, 37
Coke on Littleton, I	23, 24, 25, 30, 31, 36, 37, 38, 49, 64, 72
Constitution, Article VI of Amendments	2
Constitutions of:	
California (Art. I, sec. 7)	68
Idaho (Art. I, sec. 13)	68
Massachusetts (Part I, sec. 12)	68
New Hampshire (Art. 16)	68
New York (Art. I, sec. 2)	68
North Carolina (Art. I, sec. 13)	68
North Dakota (Art. I, secs. 7, 8)	68
Utah (Art. I, sec. 10)	68
West Virginia (Art. III, sec. 14)	68
Department of Commerce:	
Fifteenth Census, Population, Bureau of the Census	11, 12
Press Release of May 11, 1936, Bureau of Census	11
Departmental Committee, *Report on Jury Law and Practice*, 1913, Cd. 6817	48
District of Columbia, Public Assistance Division, Monthly Statistical Report, August 1935	13
Duncombe, Trials per Pais, 169 (9th Ed. 1793)	25, 34
Fitzherbert, Abridgment, Challenge	22, 28, 29, 51
Forsyth, Trial by Jury	66
Glanville, Bk. II, c. XII (Beames Ed. 1900)	22
Hale, Pleas of the Crown, II	23, 24, 32, 37, 38
Halsbury's Laws of England, XIX (Hailsham's Ed. (1935))	50
Hamilton & Addison, Criminal Law and Procedure	49
Hawkins, Pleas of the Crown, II, c. 43	35, 64
H. Rpt. 1421, 74th Cong., 1st Sess	9
Indices to Parts 2–5 of Year Books	22
Lawson and Keedy, Criminal Procedure in England, 1 Journ. Crim. Law and Criminology	48
Maitland, Constitutional History of England	50

Miscellaneous—Continued.

	Page
Nathan, Common Law of South Africa (1907), IV	49
Pollock & Maitland, History of English Law, I, II	21, 50
Rolle, Abridgment, II	32, 33, 34
Sen. Rept. 1297, 74th Cong., 1st Sess	9
Staunforde, Pleas of the Crown	30
Stephen, Commentaries, III (14th Ed.)	24, 25
Stubbs, Constitutional History of England (2d Ed.) II	50
Sunderland, Modern English Legal Practice, 4 Texas Law Rev. 273	48
Thompson & Merriam, Juries	25, 66
Tidd, Practice, II	23, 25
United States Civil Service Commission, Semi-Annual Statement, December 31, 1935	12
Viner, Abridgments, XXI	25, 36
12 Op. Atty. Gen. 319	66
79 Cong. Rec. 11584	10
79 Cong Rec. 13401	10

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 34

THE UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND WOOD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the Police Court. The opinion of the Court of Appeals (R. 8) is reported in 83 F. (2d) 587.

JURISDICTION

The judgment of the Court of Appeals was entered March 25, 1936 (R. 16). The petition for writ of certiorari was filed on April 20, 1936, and was granted on May 25, 1936 (R. 17). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Rule XI of the Rules of Practice and

Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the Act of Congress removing the disqualification of Government employees and pensioners as jurors in the District of Columbia in cases in which the United States is a party contravenes the Sixth Amendment to the Federal Constitution.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article VI of the Amendments to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Act of August 22, 1935, c. 605, 49 Stat. 682:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 360 of title 18 of the Code of the District of Columbia of 1929, otherwise known as "section 217 of the Code of Law for the

District of Columbia", approved March 3, 1901, be, and the same is hereby, amended to read as follows:

"All executive and judicial officers of the Government of the United States and of the District of Columbia, all officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard of the United States in active service, those connected with the police and fire departments of the United States and of the District of Columbia, counselors and attorneys at law in actual practice, ministers of the gospel and clergymen of every denomination, practicing physicians and surgeons, keepers of hospitals, asylums, almshouses, or other charitable institutions created by or under the laws relating to the District of Columbia, captains and masters and other persons employed on vessels navigating the waters of the District of Columbia shall be exempt from jury duty, and their names shall not be placed on the jury lists.

"All other persons, otherwise qualified according to law whether employed in the service of the Government of the United States or of the District of Columbia, all officers and enlisted men of the National Guard of the District of Columbia, both active and retired, all officers and enlisted men of the Military, Naval, Marine, and Coast Guard Reserve Corps of the United States, all notaries public, all postmasters and those who are the recipients or beneficiaries of a pension or other gratuity from the Fed-

eral or District Government or who have contracts with the United States or the District of Columbia, shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service: *Provided,* That employees of the Government of the United States or of the District of Columbia in active service who are called upon to sit on juries shall not be paid for such jury service but their salary shall not be diminished during their term of service by virtue of such service, nor shall such period of service be deducted from any leave of absence authorized by law."

Approved, August 22, 1935.

Prior to the above amendment, Section 360 of Title 18 of the Code of the District of Columbia of 1929 read as follows:

360. *Exemption from jury service.*—All executive and judicial officers, salaried officers of the Government of the United States and of the District of Columbia, all officers and enlisted men of the National Guard for the District of Columbia, both active and retired, and those connected with the police or fire departments, counselors and attorneys at law in actual practice, ministers of the gospel and clergymen of every denomination, practicing physicians and surgeons, keepers of hospitals, asylums, almshouses, or other charitable institutions created by or under the laws relating to the District, captains and masters and other

persons employed on vessels navigating the waters of the District shall be exempt from jury duty, and their names shall not be placed on the jury lists.

STATEMENT

Respondent Wood was tried in the Police Court of the District of Columbia under an information charging petty larceny from the Palais Royal, a private corporation. At his trial twelve prospective jurors were called. One was the holder of a bonus certificate. Four were clerks, respectively, in the Weather Bureau, the Federal Emergency Relief Administration, the Treasury Department and at the Navy Yard. Another was a housewife who received a Civil War pension. Counsel for the respondent challenged these jurors, in that they were disqualified by their interest in the Federal Government, and excepted to the disallowance of the challenge. He then used his three preemptory challenges to strike the holder of a bonus certificate and the two clerks in the Weather Bureau and the Federal Emergency Relief Administration. The jury finally impaneled thus included the clerk in the Treasury Department, the clerk at the Navy Yard, and the recipient of a Civil War pension. Respondent renewed his challenge to these jurors and the jury was sworn over his objection and exception. (R. 4–5.)

Respondent was tried and convicted, a motion for a new trial on the ground that the jury

was illegally constituted was overruled, and sentence of confinement in jail for 240 days was imposed (R. 5). On appeal, the Court of Appeals for the District of Columbia reversed the judgment, Robb, J., dissenting (R. 14). This Court granted certiorari (R. 17).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding that the Act of August 22, 1935, is unconstitutional as contravening the Sixth Amendment.

2. In holding that Government employees and pensioners are disqualified by interest from acting as jurors in cases in which the United States is a party.

3. In reversing the judgment of the Police Court of the District of Columbia.

SUMMARY OF ARGUMENT

I

The Act of August 22, 1935, was passed in order to remove the disqualification supposed to attach to Government employees and pension holders when called to serve as jurors in Government cases in the District of Columbia. This was made necessary by the high ratio of Government employees among the residents of the District, amounting to more than 40 per cent of the eligible jurors. But in qualifying this type of juror, Congress did not

exempt him from the ordinary challenge for cause, and any Government employee may, like other jurors, be challenged for bias.

II

If the Government employee were a qualified juror in Government cases at common law when the Sixth Amendment was adopted, there is nothing in that Amendment which forbids Congress to authorize a similar practice for the District of Columbia.

III

Throughout the long period from the development of the jury system to modern times, the English common law has permitted a servant of the king to serve as a juror in Crown cases, providing he had no actual bias. Such is the unanimous verdict of the commentators from Fitzherbert to the nineteenth century, such is the unanimous holding or indication to be drawn from the cases from the Year Books to modern times, and such is the necessary consequence of the role of the king's sheriff in choosing the jurors in Crown cases.

The American views are in accord, with the possible exception of *Crawford* v. *United States,* 212 U. S. 183. This decision may be viewed as limited to a case where the Government employee was connected with a Department interested in the outcome of the case, but if it be viewed as of general appli-

cation it is asked that it be reexamined because not decided in the light of the established common law doctrine that the Government employee is on a different footing from the servant of a private party. Apart from this case, eighteen states, a Circuit Court of Appeals, the Court of Appeals of the District of Columbia, and a territorial court have decided that a public official was not disqualified to serve as a juror in a Government case, while none, where there was no actual bias, has come to a contrary conclusion.

In result, the jurors who served in this case were qualified at common law and irrespective of the Act of August 22, 1935.

IV

If, however, the Act should be viewed as a modification of the common law, it is submitted that the Sixth Amendment does not stand in the way. Dicta in the *Crawford* case indicate that its rule was intended to be subject to legislative modification. Since the supposed modification consists only in allowing a juror to serve when he is subject to a wholly hypothetical bias, and who is subject to challenge for any actual bias, it is inconsequential in character and is more remote from the essential elements of the trial by an impartial jury than are many other modifications which have been allowed under the Sixth Amendment.

The fact that thirty States by statute or decision have made a similar modification, if such it be, is

persuasive evidence that the essential features of the common law jury have not been reached by the Act, both because of the generality of the practice and because these States, too, have constitutional guaranties of trial by an impartial jury.

V

If there by any objection under due process which is not more appropriately raised under the Sixth Amendment, the Government believes it to be without substance.

ARGUMENT

I

FACTUAL BACKGROUND OF THE ACT AND EFFECT OF ITS PROVISIONS

The factual situation out of which grew the Act of August 22, 1935, needs little elaboration. The District of Columbia is a compact community whose economic life centers about the Federal Government. The effect upon the jury system of the District is summarized in the committee reports [1] recommending passage of the Act:

> At the present time it is exceedingly difficult to obtain the best personnel on juries in

[1] House Rept. 1421, Sen. Rept. 1297, 74th Cong., 1st Sess. The part quoted is found in both reports and includes the entire body of each report, save that the Senate report adds that the bill was drafted by a commission appointed by the District Commissioners and that the Commissioners recommended passage.

> the District, due to the many exemptions from service which now prevail. Section 360 of title 18 of the 1929 Code (sec. 217 of the 1901 Code) contains the statutory exemptions. In addition thereto, however, by judicial construction, the exemption in criminal cases has been extended to cover all employees of the District of Columbia or the United States, officers and enlisted men of the National Guard, the Military, Naval, Marine, and Coast Guard Reserve Corps, notaries public, postmasters, receivers, and beneficiaries of pensions or gratuities from the Federal or District Government, and all those who have contracts with the United States or the District of Columbia. These exemptions take from those who would otherwise be qualified some of the best jurymen available and makes the empaneling of a jury much more difficult. This bill would eliminate these additional exemptions above stated.

Senator King, in charge of the bill, urged its passage because:[2]

> * * * the bill is recommended by the bar association, by the District Commissioners, and by the corporation counsel. Under existing law there are so many exemptions that it is sometimes difficult to obtain a jury. It is the desire to limit the number of exemp-

[2] 79 Cong. Rec. 13401. There was no other discussion of the bill, and it passed each House without roll call. 79 Cong. Rec. 11584, 13401.

tions so it may be possible to draw jurors from a broader citizenship and to have an improved service in the District.

Since it is impossible to obtain complete figures for all relevant classifications of the District of Columbia population, the facts to which the legislative history refers cannot be established with complete precision. However, tolerably accurate estimates can be made. The qualifications of jurors are prescribed in Section 357 of Title 18 of the Code of the District of Columbia. In 1930 there were 300,271 qualified jurors available.[3] By 1935 this figure may be taken to have increased to 366,330.[4] Of the exemptions from jury duty pro-

[3] The figures are drawn from Fifteenth Census, Population, Bureau of the Census, Department of Commerce, and citations are to that publication.

In 1930 there was a total population of 486,869 (IV, 321). Of these, 136,446 were under 20, 9,887 were 20 (one-fifth of 20–24 classification), and 27,253 were over 65 years of age (III, pt. 1, 385). This leaves 313,283 of the requisite age qualifications. Of the total District population 2.3 per cent are aliens and 1.9 per cent of those over 21 are illiterate (III, pt. 1, 386). If it be assumed that this ratio holds for the age groups 21–65, 7,206 and 5,816 are, respectively, disqualified by these requirements, leaving a total of 300,261. It is impossible to obtain a figure for the number of the residents of the District who have been convicted of a felony or a misdemeanor involving moral turpitude.

[4] The total population was estimated to have increased from 486,869 to 594,000. Press Release of May 11, 1936, Bureau of Census, Department of Commerce, p. 2. This is an increase of 22.0% and may be assumed to have been reflected proportionately in the 21–65 age group.

vided by Section 360, prior to its amendment in 1935, those relating to attorneys, clergymen, physicians, masters, and sailors employed on vessels, firemen, policemen, soldiers, sailors, and marines may be said to be usual and necessary.[5] Those included in these exemptions numbered 10,155 in 1930,[6] and may be assumed to have increased to 12,381 by 1935.[7] This leaves a total of 353,949 who would be eligible for jury service apart from their Government employment.

In 1935 there were 111,692 permanent and temporary civil employees in the executive branch of the United States Government in the District of Columbia.[8] In the same year there were 13,226 employees of the District of Columbia,[9] 9,442 em-

---

[5] The other exemptions are keepers of hospitals and charitable homes and asylums, members of the National Guard, and "all executive and judicial officers, salaried officers of the Government of the United States and of the District of Columbia." In Section 358 of Title 18 of the Code of the District of Columbia it is provided that jury service shall not be compulsory for women.

[6] In 1930 there were, of an age under 65, 3,250 attorneys (IV, 328, 329), 653 clergymen (IV, 328), 1368 physicians (IV, 328, 329), 105 persons employed on vessels (IV, 322, 323), 708 firemen (IV, 325), 177 marshals and detectives (IV, 325), 1,177 policemen (IV, 325), and 2,717 soldiers, sailors, and marines (IV, 325).

[7] Assuming that the number engaged in these occupations increased, as did the total population, by 22.0 per cent.

[8] Semi-Annual Statement of United States Civil Service Commission, December 31, 1935, p. 5.

[9] There were 10,226 permanent employees, 1937 Budget Message, p. 813, and the office of the District Government reports an average of 3,000 temporary employees.

ployees of the legislative branch of the United States Government,[10] and 18,654 otherwise qualified residents of the District benefiting by emergency work or relief programs.[11] This gives a total of 153,874 otherwise eligible jurors who are employed by the United States.[12] To this figure must be added the 3,860 veterans in the District of Columbia who are receiving disability compensation.[12] This gives a total of 156,874 otherwise eligible jurors who would be disqualified were the mere fact of employment by or receipt of benefits from the Government to make their ineligible.[13]

---

[10] 1937 Budget Message, p. 809. All of these employees may be assumed to be employed in the District of Columbia.

[11] The figures are 6,940 employed by the Works Progress Administration and 3,243 by the Public Works Administration; they were obtained from the records of the two Administrations. In August 1935, 8,471 cases were receiving direct relief alone. Public Assistance Division of District of Columbia, Monthly Statistical Report, Table 3. Since 69.2 per cent of these cases were families, it is conservative to assume that each case involves one prospective juror.

[12] Figures from the records of the Veterans' Administration. From the same source it appears that 26,850 residents of the District received the veteran's bonus. An indeterminate number of these men are in the Government service and it has been thought best to ignore the entire group.

[13] The figure is inaccurate. A good number of these employees live outside of the District and a smaller number are outside of the 21–65 age group. It has arbitrarily been assumed that these would approximately be off-set by the total of: (1) employees of the judicial branch resident in the District who would otherwise be eligible; (2) those receiving civil disability compensation; (3) those under 65 receiving pensions of various types; and (4) bonus recipients not employed by the Government.

These persons represent 44.3 per cent of all the eligible jurors in the District of Columbia. It should be noted that this figure would be much higher if the members of the immediate family of the Government employee were also included and would reach a startling proportion if it included those who had contracts with the Government, and their employees.

To remedy this situation the Act of August 22, 1935, was passed. It continued the exemption from jury service of executive and judicial officers of the United States and the District, of officers and enlisted men in active service in the Army, Navy, Marine Corps and Coast Guard, and those connected with the police and fire departments. It then provided that—

> All other persons, otherwise qualified according to law whether employed in the service of the Government of the United States or of the District of Columbia, all officers and enlisted men of the National Guard of the District of Columbia, both active and retired, all officers and enlisted men of the Military, Naval, Marine, and Coast Guard Reserve Corps of the United States, all notaries public, all postmasters, and those who are the recipients or beneficiaries of a pension or other gratuity from the Federal or District Government or who have contracts with the United States or the District of Columbia, shall be qualified to serve as

> jurors in the District of Columbia and shall not be exempt from such service: * * *

The Act states that "persons * * * employed in the service of the Government of the United States or of the District of Columbia", and also "those who are the recipients or beneficiaries of a pension or other gratuity from the Federal or District Government or who have contracts with the United States or the District of Columbia" shall be qualified to serve as jurors. The phrase first quoted is much broader than "executive and judicial officers, salaried officers of the Government of the United States or of the District of Columbia" (section 360 before amendment) and qualifies persons who were neither disqualified nor exempt in cases not involving the Government. The second phrase, covering pension holders and contractors, specifies a class of jurors fully qualified to serve in non-Government cases. It is plain that the Act was intended to remove the disqualification assumed to attach to these persons when called to serve as jurors in a Government case; otherwise their specification would be wholly meaningless.

If there were any doubt as to this construction, it would be removed by the committee reports which state that these persons were to be declared qualified because "by judicial construction, the exemption in criminal cases has been extended to cover" them (see p. 10, *supra*). The practice under this Act has been that the Government em-

ployee, pension-holder, or contractor is not for this reason alone disqualified to serve as a juror in a Government case. The court below has so construed the Act; it assumed that the jurors challenged in this case were qualified under the Act, and held the Act unconstitutional (R. 9–10, 12). It seems plain that the Act was intended to remove not only personal exemptions but also the disqualification assumed to attach to any governmental employee, pensionholder or contractor called to serve as a juror in a Government case.

But there is nothing in the Act to suggest that the ordinary challenge for cause is to be forbidden against these jurors. They are merely declared to "be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service." They are expressly required to be "otherwise qualified according to law." Their position is thus no different from that of any other qualified juror and the Act contains nothing on which any special immunity to challenge could be rested. It seems quite plain that the Government employee or pension holder, whose exemption from jury service is removed by this statute, is fully as subject to a challenge for bias as is any other qualified juror. For example, employment in the prosecuting branch of the Government might well be the basis of a challenge to a juror in a criminal case. So, too, an employee in the Veterans' Administration would be subject to challenge in a suit on a War

Risk Insurance policy. Similarly, any person made a qualified juror by this Act would be subject to any challenge directed to his personal relations to a party or to any conduct which indicated partiality. The sole purpose of the Act was to remove a disqualification which was based upon the unrealistic hypothesis that each employee or pension holder of the Government has such an interest in seeing the Government win *any* case that he cannot be an impartial juror.

The present case illustrates the small likelihood of bias on the part of a juror subject to no possible challenge save his employment by the Government. The case involves theft from a private corporation, the Palais Royal (R. 4). The jury included a clerk in the Treasury Department, a clerk at the Navy Yard, and the recipient of a Civil War pension [14] (R. 4–5). It may be presumed that they, in common with most citizens, disapproved of theft and believed that the guilty thief should be punished. But any contention that they must have felt a special interest in seeing the United States win its case ignores the realities of the situation. They had no more contact with the law enforcement and

[14] The three jurors struck by peremptory challenge were clerks in the Weather Bureau and the Federal Emergency Relief Administration and the holder of a bonus certificate. While their qualifications are not before this Court, *Spies* v. *Illinois*, 123 U. S. 131, 168, it should be noted that their position differs in no manner from those remaining on the jury.

prosecuting branches of the Government than did any resident in private employment. It seems impossible that these jurors should feel any sense of solidarity with or partiality toward the prosecuting attorney merely because he, as do they, regularly receives checks drawn on the Treasury. Intimacy and favor become diluted far beyond their perception when the bonds said to constitute the attachment run indifferently to each of 150,000 others.

If the juror is to be held biased merely because he is a Government employee, we are unable to see that the private party can ever have a fair trial in a Government case. For every Federal judge receives his salary, not from some disinterested source, nor even from both litigants indifferently, but from the Government alone. If it be thought that the supposed bias would flow not only from favor to the source which pays the salary but also from fear of punitive action, it need only be pointed out that the territorial judges and the judges of the inferior courts of limited jurisdiction in the District (including the judge of the Police Court in this case) hold office only for a term. Unless it be thought that the juror, in contrast to the judge, is peculiarly subject to bias, the necessary result of respondent's position is to disqualify from sitting in Government cases, at the least, every Federal judge not holding office for life.

II

IF AT COMMON LAW THE CROWN SERVANT WERE A QUALIFIED JUROR IN CROWN CASES, THE SIXTH AMENDMENT DOES NOT FORBID A DISINTERESTED GOVERNMENT EMPLOYEE TO SIT AS JUROR IN GOVERNMENT CASES

The test by which to measure the validity of an act challenged under the Bill of Rights is well established. It has admirably been set forth, in contrast to the other great classes of constitutional provisions, in *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 669:

> Whether a clause in the Constitution is to be restricted by the rules of the English law as they existed when the Constitution was adopted depends upon the terms or the nature of the particular clause in question. Certainly, these rules have no such restrictive effect in respect of any constitutional grant of governmental power (*Waring* v. *Clarke* [5 How. 441], *supra*), though they do, at least in some instances, operate restrictively in respect of clauses of the Constitution which guarantee and safeguard the fundamental rights and liberties of the individual, the best examples of which, perhaps, are the Sixth and Seventh Amendments, which guarantee the right of trial by jury. That guaranty has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements rec-

> ognized in this country and England when the Constitution was adopted.

Thus, neither the Sixth nor the Seventh Amendment prevents modification of the jury system known to common law, so long as its essential characteristics are preserved. *Walker* v. *New Mexico & Southern Pac. R. Co.,* 165 U. S. 593, 596; *Ex parte Peterson,* 253 U. S. 300, 309–310; *Patton* v. *United States,* 281 U. S. 276; *Gasoline Products Co.* v. *Champlin Refining Co.,* 283 U. S. 494, 498.

But if any practice, said to impair the right to a trial by an impartial jury, were recognized at common law at the time of the adoption of the Amendments, the Constitution cannot serve to invalidate it. As this Court said, in *Baltimore & Carolina Line* v. *Redman,* 295 U. S. 654, 660, of the practice of reserving judgment on a motion for directed verdict—

> But whatever may have been its origin or theoretical basis, it undoubtedly was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment.

See, to the same effect, *Schick* v. *United States,* 195 U. S. 65, 69; *Salinger* v. *United States,* 272 U. S. 542, 548; *Patton* v. *United States,* 281 U. S. 276, 288: *Dimick* v. *Schiedt,* 293 U. S. 474, 476, and, as

to the guaranties of the Fifth and Fourteenth Amendments, *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 277; *Ownbey* v. *Morgan*, 256 U. S. 94, 104–105, 112.

Since the impartial jury secured by the Sixth Amendment is that known to the common law in 1791, the prime inquiry is whether the common law operated to disqualify a juror in a Crown case when he had no interest, personal or official, in its outcome except that which might be ascribed to his employment in an unrelated branch of the Crown service. If, as the Government submits, there was no such disqualification, the Sixth Amendment cannot be taken to invalidate a statute removing such a disqualification.

III

AT COMMON LAW THE KING'S SERVANTS SAT ON JURIES IN CROWN CASES

1. Introduction

By the end of the thirteenth century the common law jury had developed to something like its modern form. *Pollock & Maitland*, History of English Law, II, 609–630, 638. By this time the notion had taken firm root that the jury must stand impartial between the parties. This impartiality was secured by the device of challenges.

The mechanism of the challenge to the jurors seems to have emerged with the beginning of the

jury system.[15] Britton, writing about 1300, mentions a number of grounds of challenge of a juror because of bias. *Britton,* I, 134b–135. Fitzherbert cites, apparently from the manuscript reports, cases of challenge because of possible bias which go back as far as 17 Edw. II (1324). *Abridgment,* Challenge, 168. By the time of Edward III the Year Books contain numerous examples of challenge because of possible bias. The published cases reported during his reign (1327–1377) include about 80 which deal with the challenge of jurors; of these cases approximately 40 deal with challenges based upon the alleged bias of the sheriff or of the jurors, while the remaining cases are divided about equally between those that deal with challenges for causes other than bias and those that relate to the procedure of the challenge. See Indices to Parts 2–5 of *Year Books.* It is abundantly plain that by the last half of the Fourteenth Century the concept of an absolutely impartial jury had become a part of the system of trial by jury and that the challenge had developed into an effective mechanism for securing this impartiality.

The challenge might be directed either to the array or to the polls. If the array were challenged, the only issue was the impartiality of the sheriff

---

[15] Even prior to the time the jury was in general use, those who comprised the grand assize or assize of novel disseisin were subject to challenge because of bias. See *Glanville,* Bk. II, c. XII, n. (Beames Ed., 1900, p. 50); *Bracton, De Legibus Angliae,* folio 185a (Twiss Ed., III, 185).

who had selected the jurors. The modern system of selection by lot was not introduced until much later (see p. 50, *infra*), and the impartiality of the sheriff was thus a matter of prime concern. If he were found to be biased, or to stand in close relationship to one of the parties, the entire jury panel was automatically disqualified. The challenge to the polls was based upon the qualifications of the juror himself. The standard classification is that of Lord Coke, who divided the grounds of challenge into four groups: *propter honoris respectum*, to challenge a peer of the realm in the trial of a commoner; *propter defectum*, to challenge for alienage, bondage, or want of a freehold; *propter affectum*, to challenge for partiality or bias; *propter delictum*, to challenge a juror who had been attained or convicted of felony. If found to be disqualified, he was set aside and the next juror on the panel sworn in his place. See, generally, *Coke* on Littleton, I, 156a et seq.; *Hale*, Pleas of the Crown, II, 274, n.; *Tidd*, Practice, II, 851–852; *Blackstone*, Commentaries, III, 358–359.

The challenge *propter affectum*, whether directed to the sheriff or to the juror, took two forms, a challenge in principal and a challenge to the favour. The challenge in principal was based upon the acts, status, or relationship of the juror or sheriff from which favour to the one party or bias against the other party would be so probable that, from early times, there arose an irrebuttable

presumption of disqualification. Examples are kinship to or tenancy under a party, or having an interest in the outcome of the case. The juror or array challenged in principal on such grounds was set aside by the judge. The challenge to the favour was based upon any circumstance whatever which might be thought to make a sheriff or juror partial to the suit of either party. If the bias alleged by the challenger to the favour were denied, either by the sheriff or juryman or the other party, the court appointed "triors" to determine the issue. The triors were the jurors already sworn, if there were so many as two of them, and, if not, two indifferent persons chosen by the judge. See, generally, *Coke* on Littleton, I, 157b; *Hale,* Pleas of the Crown, II, 275, n.; *Bacon,* Abridgment, V, 366; *Stephen,* Commentaries, III, 593–594 (14th Ed.); *Blackstone,* Commentaries, III, 363.

In this rather intricate classification, the difference between the challenge to the array and that to the polls may for present purposes be ignored. Apparently no reported case and no commentator suggests that there may be any difference in the grounds for challenge of the sheriff or the juror.

One of the grounds for disqualifying a sheriff or juror was that he was a servant of one of the parties. The commentators who have discussed this ground of challenge agree that it is a good challenge in principal, operating irrespective of actual partiality, if the sheriff or juror be a servant

of a private party to the suit. *Coke* on Littleton, I, 156a, 157b; *Duncombe,* Trials per Pais, 169; *Viner,* Abridgement, XXI, 229; *Bacon,* Abridgement, V, 343; *Tidd,* Practice, 853; *Chitty,* Criminal Law, I, 537; *Blackstone,* Commentaries, III, 363; *Archbold,* King's Bench Practice, I, 203, 205; *Archbold,* Criminal Practice and Pleading (24th Ed.), 210; *Stephen,* Commentaries, III, 593; *Thompson & Merriam,* Juries, sec. 185; cf. *Britton,* I, 135.

The rule is well founded in reason. The master was generally in intimate and daily contact with his servant. The servant, in turn, of necessity felt his welfare closely bound to that of his master, even in the ordinary affairs of life. These ties would be expected to be drawn much closer when the master is confronted with the catastrophe of a law suit. None can quarrel with the justice of the rule which excludes such a servant from the jury which is to pass judgment on his master's case.

But from this it does not follow that a servant of the King would, because of this fact alone, be unacceptable as a juror in Crown cases. In the first place, he is but one of thousands of employees and has no intimacy of contact with his employer. Second, he is engaged in activities which have no relation to the subject matter of the suit. If chance or design operated a call a juror who did have an official or personal interest in the subject

94776—36——3

matter he should, of course, be subject to challenge for bias. Third, the Crown resources are such that no employee could fear that loss of the suit would have an adverse effect upon his own position. See *Watson* v. *North British Ry. Co.*, 30 Scot. Law Rep. 252 (Ct. of Sess., 1901) where the ordinary rule was held inapplicable to a juror who was one of 18,500 employees of the defendant.

There is, in common with the case of private employment, only the possibility that the employer through threat of discharge might coerce a decision in his favour. It needs no elaboration to demonstrate that this danger is illusory. It could arise only if the entire Government (by hypothesis, any member of the prosecuting branch would be subject to challenge for bias) were engaged in a systematic attempt to prostitute the course of justice.

In apparent accord with our view that the rule as to private parties has no reason when the employer is the government, every text and every case which dealt with the subject prior to the adoption of the Federal Constitution agrees that the disqualification attaching to a servant of a private party did not apply to a servant of the King.[16] Our

---

[16] In the material which follows we shall discuss only the Government employee. If he is a qualified juror in a Government case, it follows *a fortiori* that the juror who receives a pension from the Government is not disqualified. The employee's contact with the Government is daily and intimate; the pensioner's is periodic and distant. Except in the case of a pension holder who is incapacitated and who

analysis of the problem and of the authorities leads to the conclusions: (1) there was no absolute disqualification, and neither sheriff nor juror could be challenged in principal because he was a servant of the King; but (2) in the case of *actual* partiality to the Crown, or malice toward the other party, the sheriff or juror was disqualified, and was therefore subject to challenge to the favor. The authorities do not fit into this scheme with complete precision, but there is none which denies the general proposition that the challenge based upon employment by a party is inapplicable to the servant of the Crown.

2. The Comment

The first great commentator to write after the development of the jury system was Fitzherbert,[17] whose abridgment was first published in 1516.

---

has no means of support but his pension, the financial dependence on the Government is plainly much more in the case of the employee.

We recognize that at common law the recipients of certain crown pensions were exempt from jury service by virtue of an ancient privilege. *Blagney's Case*, Cas. T. Hard, 202, 95 Eng. Rept. 129. But this exemption was a personal privilege and was not a disqualification or a ground of challenge. *Viner*, Abridgement, XXI, 210–213 and cases cited.

[17] His writing, as that of Brooke, Rolle, Bacon, and Viner, is in the form of an abridgment of decided cases into a summary statement of the proposition of law. Since the result seems as much creative as reportorial, we have followed the customary practice of treating these men as authors rather than reporters.

His statement is quite explicit that there can be no principal challenge, but only one to the favour (requiring actual bias), because a juror in a Crown case is a servant of the King. Thus, summarizing an unpublished case in 3 Henry VI, he states:[18]

> In quare impedit by the King against an abbot, and an abbot A. defaulted and A. appeared and was at issue against the King and challenged a juror because he was of the King's livery and all the court held that this was not a principal challenge but he must conclude with the words "and he is thus favorable."

Again, when dealing with challenges generally, rather than as either in principal or to the favour, he states:[19]

> An office found was traversed and the inquest appeared and the array was challenged because the Sheriff favored the King more than the party and this was held to be of no significance for he should do so by reason of his obedience but some say that it is a good challenge that the Sheriff had been Valet of the King's crown or a similar especially menial [spelt 'manual'] servant.

---

[18] *Fitzherbert*, Abridgment, Challenge, Sec. 17, folio 172 (1577 Ed.).

The translation of passages from the commentators (and from *King* v. *Jenney*, *infra*) available only in the Norman French is by Mr. Malcolm S. Mason of the School of Law of Columbia University.

[19] Challenge, Sec. 63, citing an unpublished case in 22 Edw. IV.

This paragraph has led to much difficulty with some of the later commentators, as is shown below, because of Fitzherbert's failure to make explicit that the exception of the menial servant was a challenge to the favour. This is made plain by a later passage where he says that there can be *no* general, or principal, challenge for favor to the King.[20]

Chief Justice Brooke, in his Abridgment, relies on two cases in the time of Henry VII, to establish that one cannot have a challenge to a juror because he is a servant of or favorable to the King.[21]

---

[20] Challenge, Sec. 65. A translation follows:

On an information the array was challenged by the King because it was favorably made and all the judges of both courts agreed that this challenge lies well enough and it was therefore tried and found against the King. Bryan: where the King is party the party cannot challenge the inquest generally but especially, for example on the ground that the Sheriff is his adversary and in this matter which Haught. conceded etcetera.

[21] *Brooke*, Abridgment, Challenge, folio 126, Secs. 154, 155. A translation follows:

154. Traverse against the King was at issue and the King challenged on the ground that the Sheriff who made the panel was related to the plaintiff and this was allowed as a good challenge. However, it was said that one shall not have a challenge against the King on the ground that a juror is a servant or favorable to the King. * * * 4 Hen. 7. 2. [Correct citation: 4 Henry VII 3, H. pl. 5.]

155. Issue between the King and the party for breach of the peace and the array was challenged by the King because it was favorably made at the nomination of the defendant and it was agreed that

Staunforde is unmistakably clear that a servant of the King could not be challenged, in principal, for this reason alone, but that the challenge must be to the favor, requiring actual bias to be proved. He states: [22]

> And as the King may challenge against the party, so may the party challenge against the King as appears under the title Challenge in Fitzherbert P. 16 and P. 17, P. 3 Hen. 6, where a juror was challenged because he was of the King's livery. But it was held by the whole court that this was no principal challenge but a challenge for favor, and he must end his challenge with the words, "and he is thus favorable", and with that agrees P. 63 M. 22 Edw. 4, and P. 129, where the array was challenged and quashed although the King was a party. * * *.

Lord Coke's treatment of the subject (*Coke* on Littleton, I, 156a) is clear only on the proposition that challenges to the sheriff or a juror against the King were not on the same footing as those against a private party. His discussion of the grounds of a challenge in principal, which include the objection that the sheriff is the servant of a party, is plainly meant to be inapplicable to the case where

---

the King could have this challenge and he could challenge the polls for favor, which note, but one will not have a challenge against the King. * * *

[22] *Staunforde*, Pleas of the Crown, 162.

the government was the employer.[23] These challenges in principal are, however, treated together with those for favour to the King. Coke states (I, 156a):

> But where the king is partie, one shall not challenge the array for favour, &c. because in respect of his allegiance he ought to favour the king more. But if the sherife be a vadalect [valet] of the crowne, or other meniall servant of the king, there the challenge is good.

In view of the references to this passage which are found in the discussion of the challenge in principal, Coke must have meant that the servant of the king could be challenged neither in principal nor to the favour, unless he were in personal waiting to the king, and so as likely as the servant of a private party to be partial; the challenge presumably would then be to the favour.[24]

---

[23] The text reads: "and where the array shall be challenged against the king, you shall read in our books." Again, still dealing with challenges in principal, he states: "And when the king is partie * * * he that traverseth may challenge the array, as hereafter in this Section shall appeare."

[24] Hargrave's annotation to this passage takes the view that Coke's exception to the general rule is best to be explained on the ground that challenges against the king were challenges in principal. *Coke*, on Littleton, I 156a–156b, n. 281. This seems absurd, since a challenge in principal would obviously make unnecessary any discussion of a chal-

Lord Hale is of the same view, save that he makes provision for a challenge to the favour, involving an inquiry as to actual bias, in all Crown cases where a juror is a servant of the King. He states (*Hale,* Pleas of the Crown, II, 271):

> Challenges by the prisoner for cause shewn are of two kinds, *viz:* Either to the array or to the poll, but it is no principal challenge either to the array or poll, that the sheriff or juror is of the king's livery, but he must conclude to the favour. *3 H. 6. Challenge 17.*

Chief Justice Rolle, whose Abridgments were compiled some time prior to the Revolution of 1649, seems to have gathered together virtually all of the summary statements regarding challenges against the King which were then to be found. *Rolle,* Abridgment, II, 645–646. In his hands, or those of his predecessors, the propositions have been overcompressed, with the result that they are not entirely consistent. But it is plain that there may be a challenge for actual favor.[25] And it is also

---

lenge to the favour, and seems also to be contradicted by the text. Moreover, the passage is a paraphrase of Fitzherbert, who elsewhere is quite explicit that there can be no challenge in principal.

[25] A translation of those paragraphs follows:

VII. If there is issue between the King and another on a presentment that he had committed a nuisance to London

plain that the fact that the juror is a Crown servant does not of itself constitute a ground of challenge in principal. Referring to Fitzherbert and the case in 3 Henry VI, Rolle says:[26]

> X. In a quare impedit by the King against J. S. if they are at issue it is no principal challenge to a juror on behalf of the defendant that the juror was of the King's livery, but his challenge must end with these words "and he is thus favorable." 3 Hen. 6, Challenge 17.

Since this much is clear, it is immaterial that Rolle, naturally enough, shows some contradiction when he deals in wholly general terms with challenges against the King, failing to consider the source of the alleged favour or the nature of the challenge.[27]

---

and other of the King's people, the defendant may challenge a juror because he was one of the presentors.

VIII. An array was quashed because it had been made by the Sheriff in favor of the King who was plaintiff in the action. Mich. 2 Hen. 4, B. R. Rot. 30.

* * * * *

XI. On an issue between the King and another it is a good challenge that the Sheriff was valet of the King's crown or a similar menial servant. 22 Edw. 4, challenge 63.

[26] Translation.

[27] A translation of these passages follows:

I. Where the King is party to an issue there can be no challenge to the array. 38 ass. 19.

II. Formerly in issues where the King was a party a challenge could be taken to the array or to the polls without showing cause. Temp. Edw. I. 83.

III. But it is otherwise today. Temp. Edw. I. 83. (Given to be approved by King and Council. See the statute in

Giles Duncombe, in 1665, wrote *Trials per Pais,* a classic text on jury trials. (Citations are to the 9th Edition, 1793.) He repeats (p. 175), almost *verbatim,* Coke's discussion, quoted above. At another place he states (p. 189):

> In an action betwixt the king and a party, the subject cannot take any challenge for favour, as in an indictment for barretry, &c., the defendant cannot challenge a juror for favour to the king. *Ibid* [*Rolle,* Abridgment, Trial, 654], pl. 1, 2.

However, he elsewhere states that the subject, even where the King is a party, may challenge the array (pp. 166–167) or the polls (p. 196). He also says (p. 203) that, while a challenge for favour to the King is bad, a challenge for malice against the defendant in a Crown case is good. Finally, he summarizes a case (*Anonymous,* 1 Vent. 309, 3 Salk. 81) where a juror was successfully challenged for favour to the prosecutor. Since it follows *a fortiori* from the statement against challenges for favour to the king that there can be none in principal, Duncombe seems to align himself with Coke

---

Magna Charta, folio 132, called Ordinatio de inquisitionibus.)

* * * * *

VI. Where the King is a party to an issue the other may nevertheless have a principal challenge. Contra 19 ass. 6.

* * * * *

IX. But it is no challenge to the array that the Sheriff favors the King more than the party, for he ought to do this by reason of his obedience. 22 Edw. 4, challenge 63.

in denying any challenge save one to the favour in exceptional circumstances. It is reasonable to assume that these exceptional circumstances would include any case of actual bias.

Hawkins reflects the confusion of thought which seems to have stemmed from Coke's position that in some but not all cases there could be a challenge to the favour. He states, *Hawkins,* Pleas of the Crown, II, c. 43, secs. 32, 33:

> It is said, That the subject cannot take a challenge for the favour against the king, because every one is bound by his allegiance to favour the king. But if no more be meant by these books, than that such a challenge is not good without shewing some actual partiality in such sheriff or juror, or some particular cause in respect whereof the king may influence them, it seems not clearly settled how the king in this respect hath a greater privilege than the subject, which yet it seems agreed that he hath.
>
> It hath been said to be no principal challenge where the king is a party, that a juror is of the king's livery, or his immediate tenant; but it is said, That a challenge for such cause ought to conclude to the favour. But these matters seeming to be unsettled, I shall leave them to be farther considered by others. * * *

Hawkins' difficulty in reconciling the special status of jurors or sheriffs said to favor the King with

their liability to challenge in cases of actual partiality seems plainly a result of his failure to consider that a challenge in principal, good against the servant of a private party, could be no more than a challenge to the favour, requiring actual bias, when the King was the employer.

Mathew Bacon in his Abridgement sets forth a close paraphrase of Hawkins' discussion of this problem, and the preceding paragraph is fully applicable to his treatment. *Bacon,* Abridgment, V, Juries, 355.

Viner, relying on the same authorities as did Coke, makes a clearer analysis than did Coke, and, at least by implication, uses the cases for the propositions that, while a challenge to the favour will lie against the king, "it is not any principal challenge to a *juror* for the defendant that he *was of the livery of the king.*" *Viner,* Abridgments, XXI, Trial, 243 (Viner's italics).

Hargrave, in his annotation to the thirteenth (1787) edition of *Coke* on Littleton, I, 156a–156b, expresses dissatisfaction with the reason assigned by Coke (see p. 31, *supra*). He adds:

> But a better principle to found the rule upon was not unobvious; namely, that from the extensive variety of the king's connections with his subjects through tenures and offices, if *favour* to him was to prevail as an exception to a juror, it might lead to an

> infinitude of objections, and so operate as a serious obstruction to justice in suits in which he is a party.

It is also of interest to note that Hargrave states:

> Also the practice since Lord Hale's time seems to have accorded with his doctrine, there being subsequent instances in print in which such an exception when taken to the polls has been disallowed, but not one I believe of its being received.

Chitty, writing in 1816, reads Coke's statement (see p. 31, *supra*) to mean that there can be *no* challenge for favour to the King, and ignores the exceptions specified by Coke in the following sentence. His discussion (*Chitty,* Criminal Law, I, 539) reads:

> It has been said that no challenge to the favor can be allowed against the king, and the reason assigned is, that the duty of allegiance must be supposed to induce a preference for him, which might defeat every panel (i); but this seems to be very subtle, and, in capital cases, at least, unfounded (k).
>
> (i) Co. Lit. 156, a.
> (k) 2 Hale, 271. Co. Lit. 156, a. n. 4.

To demonstrate error in Coke's formulation Chitty apparently uses Coke's exceptions and Hale's statement that there could be a challenge to the favour if the juror were a Crown servant without noting Hale's express and Coke's implied state-

ment that there could be no challenge in principal. Since he relies only on Coke and Hale, it is not thought that his silence as to challenges in principal amounts to a view that there could be such a challenge, good, irrespective of actual bias.

It is believed that the authorities which have been quoted above include every prominent commentator who wrote prior to or shortly after the adoption of the Federal Constitution and who considered, expressly or by implication, the extent to which the challenge to a servant of one of the parties was applicable to a servant of the Crown. They are in complete agreement that such a challenge was only partially applicable. Coke, and those who followed him, appear to have thought that there could be a challenge to the favour in some but not all cases. His position excludes, *a fortiori,* a challenge in principal. Hale, and those who followed him, thought there could always be a challenge to the favour, although never a challenge in principal. Since the Government's position is fully supported by the single doctrine that there could be no challenge in principal, it is immaterial whether Hale or Coke correctly portrayed the common law rule as to challenges for favour to the King.

3. The Cases

Most of the Year Book cases cited by the commentators appear not to have been published, but those which are available indicate a general under-

standing on the part of the bench and the bar that the ordinary disqualifications of sheriffs and jurors were as a rule inapplicable to challenges against the King. Thus, as early as 1346 counsel for the King remarks as a matter of course that none can challenge the jurors against the King, and the court qualifies this statement by an illustration of a case in which the juror would be expected to be subject to actual bias.[28] Y. B., 19 Ass. 62, pl. 6.

By the time of Henry VII the special standing of the King with respect to challenges for favour to him had become so well established that ingenious counsel sought to use it as a premise by which to prevent challenges on the part of the King. The court recognized the premise but refused to admit

---

[28] The action was on the presentment of a grand jury that the defendant interfered with navigation on the Thames, constituting a nuisance to the city of London. A translation of the relevant portion of the case follows:

> Then Pole took a challenge to the array, on the ground that it was drawn by the sheriff of Middlesex who is a deputy of and removable by the municipality of London which is a principal party. And it was overruled, since this case arises on a grand jury's presentment, to which the King is party. Green [King's Serjeant] said that when the King is the sole party one will not have a challenge to the jurors. However in this case it was said that one might have a challenge that a person who is a member of the panel was a member of the grand jury, and thus to challenge a member of the petit jury.

The translation of the Year Book cases is by Mr. Irwin L. Langbein, Attorney, Securities and Exchange Commission.

the conclusion. Y. B., 4 Henry VII 8, P. pl. 7.[29] Another counsel in the preceding term, had with equal lack of success sought to make the same argument.[30] Y. B., 4 Renry VII 3, H. pl. 5.

---

[29] A translation of the relevant portion of the case follows:

> * * * And then the King's sergeants challenged the array, and said that the panel was favorably drawn at the instance of the defendant and that the sheriff drew it through favor, etc. And the opposing attorney entered the formal denial, "Well and duly drawn." Vavisor [counsel] said that there should be no trial of the issue of empanelment, since the issue was not well joined. Challenge for favor lies no more on behalf of the king than it does against the King. Keble [King's Sergent] said that the triors might try this challenge, and if they should find "well and duly drawn" then it would be without doubt. * * * And the justices of King's Bench inquired of the justices of Common Pleas, and they said that the King could so challenge, and the challenge was so tried, and the array was found well drawn. And thereafter the King's sergeants challenged individual jurors for favor. But the party will have no challenge against the king, etc.

[30] A translation of the relevant portion of the case follows:

> A challenge was taken on behalf of the King against a person who offered a traverse against the King. And the King showed that the sheriff who drew the panel was a relative of the man who offered the traverse, etc. And it was said that this challenge would not lie on behalf of the King any more than against the King, *for it is not a challenge against the King to assert that one of the jurors is his servant or favorable to him*, and hence it is not a challenge on behalf of the King to say that the sheriff is a relative of the party. And nevertheless a challenge was

Perhaps the most conclusive evidence of the inapplicability against the King of the ordinary grounds of challenge is that the very writ under which the jury was summoned differed according as the case was between private parties or was one to which the King was a party. In *King* v. *Jenney*, Keilw. 97, 72 Eng. Rpt. 261 (1509), the reporter states: [31]

> And in this case it was said by Reade [Chief Justice] that it was not a principal challenge where the King is a party to say that the sheriff of the juror is the King's tenant. It is otherwise in the case of a common person and in the venire facias among common persons the words of the writ are "and who should be related to neither the plaintiff nor the defendant." But where the King is party the writ will never have these words.

However, it seems reasonably clear that actual partiality could be used as a basis of challenge against the King, and that the recognized immunity of the Government from the rules applicable to private parties was not allowed to work in-

---

admitted on behalf of the King against the party. * * * (Italics added.)

It is interesting that a century later counsel again urged a variety of this argument which again was rejected. *Hunsdon* v. *Baker*, Cro. Eliz. 663 (Q. B., 1599).

[31] Translation.

justice.[32] In *Rex* v. *Gonney,* Keilw. 102a, 72 Eng. Rpt. 266 (K. B., 1508) the defendant challenged the array because the sheriff bore malice against him as a result of a pending action of trespass brought by the defendant against the sheriff. The court held the challenge to be good, for, although it was no challenge that the juror was a tenant of or favorable to the King, it was a good challenge that the sheriff or juror bore malice to the defendant.[33] See also *Reg.* v. *Blakeman,* 3 Carr. & Kir. 97, 175 Engl. Rpt. 479 (Assize, 1850); cf. *Rex.* v. *Sheppard,* 1 Leach C. C. 101 (O. B., 1773). These cases are cast in terms of a challenge because of malice toward the defendant. But the challenge against the King could also be made because of special favor to him. Thus, in the trial of an information of forgery a juror was successfully

[32] An observation by Holt, C. J., when a juror was challenged in a libel prosecution because he had already formed an opinion against the writings, might be considered a possible exception. In the discussion as to the procedure the Lord Chief Justice stated that "it must be a principal challenge or nothing; for there can be no challenge to favour in the case of the crown." *Reg.* v. *Tutchin,* 14 St. Tr. 1095, 1101 (1816 Ed.). This proposition is supported neither by authority nor by reason, and Holt, in the absence of opportunity to consult authorities, must have erred in his recollection of the general doctrine that challenges against the king were a special case.

[33] Keilwey's report of the case leaves it unclear whether the proposition paraphrased in the text is his own statement or that of the court. The latter is improbable, since in that event the report would include no mention of the court's decision.

challenged because he had lately entertained the prosecutor in his house; "this was admitted to the favour, tho' against the King." *Anonymous*, 1 Vent. 309, 3 Salk. 81, 86 Eng. Rpt. 199 (K. B., 1678).

The precise question is whether a Crown servant could for that reason alone be challenged by the private party in a Crown case when the servant's position was such as to contain no implication of actual bias. The later reports appear to contain two cases decided prior to the adoption of the Federal Constitution and four decided shortly thereafter which bear upon the problem. They are unanimous, by holding or indication, that such a challenge did not lie.

In *Rex* v. *Hampden*, 9 St. Tr. 1054, 1057–1061 (K. B., 1683) the defendant challenged two jurors in that one was a servant in the King's Forest and the other a sergeant of arms attending his Majesty. Although the Attorney General subsequently consented that they stand by, and sufficient jurors were obtained without them, the challenge was disallowed. Excerpts from the colloquy between the court and counsel include the following:[34]

> Mr. *Jones*. If all that receive Salary, or Wages from the King, are not to be Jurymen in the King's Causes, then all the Dep-

[34] Counsel for the defendant, in the colloquy not quoted, understood Coke's exception of menial servants of the king (see p. 31, *supra*) to embrace the defendants. Jeffreys apparently was of the same view but thought Coke wrong.

uty Lieutenants and Militia Officers, which generally are the most substantially Freeholders, are excluded from being Jurymen.

Mr. Just. *Withins.* Who will say so, Mr. *Jones?* No Lawyer in *England* surely will say so.

* * * * *

L. C. J. [Jeffreys] Mr. Attorney, I do debate it for Learning sake, truly I know not the Man, nor whether he be the King's Servant, or not, but I speak against allowing the Challenge, that if he be set aside, it may not be taken as a Precedent, and so pass for Law that the King's Servants can't be Jurymen. I would have you quit the Man by Consent, but not as a Forceput, as tho' the Law were so, for the Law, I think, is otherwise.

* * * * *

Mr. Att. Gen. He may be a Juryman by Law sure.

L. C. J. There is no doubt of it, Mr. *Attorney.*

In *Rex* v. *Parkyns,* 13 St. Tr. 163 (O. B., 1695), more respectable authority is found. Holt was Lord Chief Justice and the time was after the Revolution of 1688. In a treason trial the defendant, in reckoning the peremptory challenges allowed to him, argued that two had been for cause, in that the jurors had been servants of the King. Holt stated "that is no cause of challenge." As counsel for the King did not insist Holt allowed the jurors to be set aside, say-

ing "but I would not have it for a precedent."

The King's Bench of Ireland in *Rex* v. *Rowan,* 22 St. Tr. 1034, 1037–1039 (1793), similarly held this to be no ground for challenge. The report of the case states:

> Upon calling over the jury, John Read was objected to, as holding a place under the crown, but the attorney-general insisting upon the illegality of the objection, and observing that it went against all that was honourable and respectable in the land, it was over-ruled by the court.

In *Rex* v. *Kirwan,* 31 St. Tr. 543 (K. B., Ire., 1812), the court was faced with a challenge to a grand juror because he held office under the Crown, removable at pleasure. Two justices held that a grand juror was not subject to challenge (pp. 566–569, 572–574) and therefore did not pass upon the ground of the challenge. But Mr. Justice Day was of opinion that a grand juror could be challenged and therefore considered the ground. He said (p. 572):

> * * * Lord Holt, who was a great constitutional lawyer, denied the right of making such a challenge to a petit juror, even where a man was upon trial for his life; *a multo fortiori,* the objection cannot lie to a grand juror, who only accuses the prisoner and sends him to trial. What could be more revolting, or monstrous than to say, where the crown was not personally, but in its po-

> litical character concerned, that it had an interest in the accusation of innocence?

The King's Bench in *The King* v. *Edmonds,* 4 B. & Ald. 471, 106 Eng. Rpt. 1009 (1821) gave a rather extended consideration to the subject of challenges. The case was appealed from *nisi prius,* the defendant urging that the Master of the Crown Office who drew the special jury was biased and that his challenge to the array should have been sustained. The court held that he could not be challenged, because he was an officer of the court. It added (pp. 483–484):

> * * * Indeed, it stands as a matter of doubt in the books, whether any challenge to the array, which operates only as a challenge to the favour, like the present, can be taken against the Crown. This being doubtful, I place no reliance upon it. * * *

As the court stated the general proposition, including cases of actual bias, it was indeed doubtful. But, in considering whether the presence of justices of the peace on the jury evidenced partiality on the part of the Master of the Crown Office, the court made it plain that crown service did not of itself disqualify a juror in a crown case. It said (pp. 487–488):

> The third ground of complaint was, that the officer named several gentlemen acting under the commission of the peace for the county. It was said that those gentlemen must be supposed not to be unindifferent be-

> tween the Crown and the defendants, upon this, which was termed a political prosecution, because they hold their office at the pleasure of the Crown. * * * It is true, indeed, that justices of the peace hold their office at the pleasure of the Crown, but they hold a laborious and burthensome, and not a profitable office; and it is really a gross calumny upon a class of persons, to whom the nation is most peculiarly indebted for valuable and gratuitous services, to suppose that they will not act impartially between the King and his people. If gentlemen of this description should be returned by the sheriff, no challenge could be taken to them individually, as a challenge to the polls, on the ground of their office; it has been the constant practice, to name some gentlemen of this class on special juries, or rather no one has ever thought of omitting them on the nomination. * * *

Although decided by the Central Criminal Court in 1848, *Regina* v. *Lacey*, 3 Cox Cr. C. 517, 519, is some evidence that the common law rule has not lost its vitality. In this trial, for treasonable felony, the following colloquy is reported:

> *Ballantine* then challenged John Pickworth, "for that the said J. P. does not stand indifferent between the crown and the prisoner." * * *
>
> The juryman was then sworn, and was asked by *Ballantine* the following question: "During the recent disturbances, have you acted as a special constable?"

The Attorney-General objected to this question as being one totally irrelevant.

PLATT, B. It is a question which has nothing whatever to do with the issue, and I cannot allow it to be put.

Finally, in *Watson* v. *North British Railway Co.*, 38 Scot. Law Rep. 252 (Ct. of Sess., 1901), each of the Lords reasoned that one of the 18,500 employees of the Railway, who was not connected with any activity relating to the cause of action, was so unlikely to be interested in the outcome of the suit that, when the status of the juror was first known after verdict, there was no occasion for a new trial. The reasoning, of course, applies *a fortiori* to the case of the Government.

There appears to be no later indication of the contemporary English doctrine. Since the practice of challenging jurors has fallen into almost complete disuse in England,[35] and since there has been no statutory change, there can be small doubt but that the Crown servant is still eligible to serve as a juror in a Crown case.

The evidence of the practice in the other common law jurisdictions might serve to indicate the common law doctrine, but it is fragmentary in the

---

[35] Departmental Committee, *Report on Jury Law and Practice*, 1913, Cd. 6817, pp. 24, 66, 67, 78, 84, 129; *Lawson and Keedy*, Criminal Procedure in England, 1 Journ. Crim. Law and Criminology 595, 609; *Sunderland*, Modern English Legal Practice, 4 Texas Law Rev. 273, 287.

extreme. The only definite indication which we have been able to find is the statement in regard to the South African statutes, found in *Nathan*, Common Law of South Africa (1907), IV, sec. 2753, that—

> * * * The prosecutor, or the prisoner, may challenge and set aside any number of jurors for any of the following causes * * * (3) in the Cape Colony and Natal, favor to the prisoner, or to the private prosecutor, or to the party who, if the public prosecutor had not prosecuted, would have been entitled to prosecute * * * (Cape, R. 47; * * * Natal Law 10, 1871, § 26.)

The implication is plain that the relationships causing favor are intended by this statute to be limited to the individuals figuring in convictions sought by the government and not to include any relationship to the government itself.[36]

4. The Case of the Sheriff

Finally, there is to be mentioned one circumstance which, even were the texts and the cases

---

[36] Still more remote evidence is found in *Hamilton & Addison*, Criminal Law and Procedure, 762, 767. In commenting on the New South Wales Jury Act of 1912 the authors rely upon *Rex* v. *Edmonds*, 4 B. & Ald. 471, and *Coke* on Littleton (see pp. 46–47, 30–31, *supra*) for the procedure of the challenge and the classification of the challenges for cause. By rather attenuated implication, these references may be taken to indicate that the rule of these authorities that a challenge may not be taken merely because the juror is a Government employee obtains as well in New South Wales.

silent, would seem to be conclusive evidence that at common law employment by the government does not of itself raise a presumption of bias. Throughout the long period between the origin of the jury trial and the adoption of the Federal Constitution challenges had been directed either to the sheriff or to the juror. For the impartiality of the sheriff was fully as important as that of the juror. He chose the jury panel not by lot but with full powers of selection; not until 1825 was selection by lot provided for in civil cases (6 Geo. IV. c. 50, sec. 26) and it has not yet been made compulsory in criminal cases.[37] No commentator and no case has been found which suggests that the sheriff is at common law any the less subject to challenge than is the juror.

The sheriff from the earliest times until the present has been an officer of the crown. *Maitland,* Constitutional History of England, 40–41, 207, 234, 485; *Stubbs,* Constitutional History of England (2d Ed.) II, 206–208. In the words of Pollock and Maitland (History of English Law, I, 519), the sheriff is "a distinctively royal officer, appointed by the King, dismissible at a moment's notice, strictly accountable to the King's Exchequer."

---

[37] Hailsham's Edition (1935) of Halsbury's Laws of England, XIX, 302, states that the Criminal Code Bill Commission has recommended the enactment of such a provision and that, as a matter of practice, it is customary to select jurors by lot.

If the common law raised an absolute disqualification against the king's servant in a crown case, it must follow as a general proposition that the array has been illegally constituted in every crown case from 1300 until the present day.[38] The reports and the commentators contain no hint that any litigant has ever had the hardihood to present a challenge which contemplated such an absurd result. Yet, unless the respondent can show a distinction between the challenge to the array and that to the polls, such is the necessary consequence of his position that employment by the Government worked an absolute disqualification at common law, irrespective of actual bias.

5. American Views as to the Common Law

The practice in the colonies prior to the adoption of the federal constitution apparently cannot be ascertained. We have searched the available reports and authorities without finding anything of relevance. Accordingly, in order to determine the view of the American authorities as to the common law rule, it is necessary to rely upon decisions subsequent to the adoption of the Sixth Amendment.

The Government recognizes that *Crawford* v. *United States,* 212 U. S. 183, 195–196, may be taken to be a decision that at common law the Government employee was disqualified to serve as a juror

[38] See *Fitzherbert*, Abridgment, Challenge, sec. 129, folio 175, that the panel must under all circumstances be drawn by a Crown officer.

in a Government case.[39] The Court held that sections 215 and 217 of the District of Columbia Code did not exclude the common law disqualifications, that at common law the servant was disqualified to serve as a juror in a case to which his master was a party, and that this rule disqualified a druggist, receiving compensation for operation of a subpostal station, in a prosecution for fraud of the Post Office Department.

The only case cited by Mr. Justice Peckham on this point is *Block* v. *State,* 100 Ind. 357, 362. This case, it is true, involves a challenge because of employment by the Government. But the juror in that case was a deputy prosecuting attorney serving under the prosecutor who tried the case. The Indiana court viewed the challenge as the equivalent of the old challenge to the favor (see pp. 361–362). The disqualification was plainly one of actual bias and the Government has no doubt that a challenge in such a case would be good both at common law and under the Act of August 22, 1935. *Block* v. *State,* then, is not authority for a disqualification of *all* Government employees. This Court in the *Crawford* case was dealing with a juror who was employed by the Department alleged to have been defrauded, and it is improbable that it, any

[39] The Crawford case was followed in *United States* v. *Griffith,* 55 App. D. C. 123, 2 F. (2d) 925, where a former Government clerk receiving disability compensation was held disqualified.

more than the Indiana court, intended to rule that a Government employee was disqualified to serve as a juror in a Government case in which he had not the remotest personal or official interest.[40]

In any event, it is certain that the decision in the *Crawford* case was not made in the light of the established common law doctrine that the Crown servant was not, for this reason alone, disqualified to serve as a juror. To establish the common law doctrine Mr. Justice Peckham cited only Blackstone (Cooley's) 4th Ed., p. 363 and *Block* v. *State, supra.* Blackstone speaks only of the general disqualification of the servant of a private party and does not consider the special status of the Crown servant. *Block* v. *State* is equally silent as to any different rule in the case of the Government employee, and cites (pp. 362–263) as authorities only those cases and passages from commentators which deal with the employees of private parties.

In the briefs filed with this Court in the *Crawford* case the petitioner's argument to establish the common law doctrine relied exclusively upon cases and authorities directed toward the disqualification of servants of private parties (see Br. for

[40] It is interesting to note that two jurors in the *Crawford* case had business relations with the Government, and were sworn over the objection of the defendant. No. 92, October Term, 1908, R. 77–78. Since this was not assigned as error in the appellate courts, the Government does not argue that their standing as jurors was approved by this Court.

Pet., No. 92, October Term, 1908, pp. 28–33). The Government did not challenge the common law doctrine asserted by the petitioner,[41] but relied instead on the District of Columbia Code as superseding the common law (see Brief for United States, No. 92, October Term, 1908, pp. 10–15).

It results that the *Crawford* case was decided wholly without consideration of the common law rule as to challenges of the Crown servant. The Government does not believe that the decision establishes or has reference to an absolute disqualification of Government employees, such as to exclude jurors who have no possible personal or official interest in the cause. But if the decision should be construed as a declaration of the common law rule as to the Crown servant, it is respectfully requested that the Court reexamine the question.

The other cases dealing with challenges to jurors who are public employees seem uniformly to have been decided cursorily, with no attempt to ground the decision on the English common law and, ordinarily, with but slightly more effort to explain the basis of the decision. However, the fact of the decision alone may be said to be fairly persuasive

---

[41] The brief (p. 11) does contain one sentence which asks the rhetorical question whether a civil employee of the United States is the "servant" contemplated by common law. The question is not amplified and relies on no authority.

evidence of the common law doctrine.[42] This is the case whether they were decided wholly without aid of statute, or on the theory that the statutory exemption is a personal exemption and not a disqualification. Three of the cases cited below[43] dealt with statutes expressly declaring the public official to be qualified, and thus by implication adjudge that there has been no denial of an impartial jury, secured by the constitution of every State (*Hayes* v. *Missouri,* 120 U. S. 68, 69).

So far as we have been able to ascertain, the public official has been held a partial juror only when he was employed as a deputy of the prosecuting attorney, *Block* v. *State, supra,* or as a deputy sheriff, *Zimmerman* v. *State,* 115 Ind. 129, 130; *Gaff* v. *State,* 155 Ind. 277; *State* v. *Golubski,* 45 S. W. (2d) 873 (Mo. App.); cf. *Chapman* v. *State,* 66 Tex. Crim. App. 489, 491. The Government thinks these decisions sound, in that the officers would seem to be subject to challenge for actual bias because of their connection with the

[42] In six cases the public officer has been expressly disqualified by statute from serving as a juror. These relate to deputy sheriffs, *Robinson* v. *Territory of Oklahoma,* 148 Fed. 830 (C. C. A. 8th); *Cawthon* v. *State,* 115 Fla. 801; *State* v. *Johnson,* 123 S. C. 50, 53–54, justices of the peace, *Terrell* v. *State,* 69 Ark. 449; *Hankins* v. *State,* 118 Ark. 419, 420–421, and a county commissioner, *Ladd* v. *State,* 17 Fla. 215. These are omitted from consideration, since they do not raise the common law question.

[43] *Hankins* v. *State,* 118 Ark. 419; *Corley* v. *State,* 162 Ark. 178; *State* v. *Petit,* 119 La. 1013.

prosecuting and law enforcement branches of the Government. However, the fact that the majority rule permits deputy sheriffs to serve as jurors in criminal prosecutions in doubly persuasive evidence that public employment is not commonly held inconsistent with the common law, or the constitutional requirement of impartiality, in cases in which the state is a party. *Pate* v. *State,* 158 Ala. 1, 3; *Territory* v. *Fukunga,* 30 Haw. 697, 703; *Spittorff* v. *State,* 108 Ind. 171, 172; *State* v. *Forbes,* 111 La. 473; *State* v. *Petit,* 119 La. 1013; *State* v. *Morgan,* 147 La. 205, certiorari denied, 253 U. S. 498; *State* v. *Foster,* 150 La. 971, 985–986; *State* v. *Lewis,* 50 Nev. 212; *Burns* v. *State,* 12 Tex. Ct. App. 269; *Edgar* v. *State,* 59 Tex. Cr. App. 252, 253–254; *Mingo* v. *State,* 61 Tex. Cr. App. 14, 15; *Young* v. *State,* 91 Tex. Cr. App. 511; *State* v. *Parker,* 104 Vt. 494. Cf. *McNish* v. *State,* 47 Fla. 69; *Coats* v. *State,* 32 P. (2d) 955, 958 (Okla. Cr. App.).

A variety of other public officers[44] have been challenged as jurors in cases where the state is a party and have been held qualified by the highest court of the state. Their positions include that of a reserve officer in the military service of the United States, *Falter* v. *United States,* 23 F. (2d) 420, 425, certiorari denied, 277 U. S. 590; a state

[44] The officers in many of the cases are county or municipal officials. We have made no distinction on this ground, since the county or municipality is merely a political subdivision of the state.

senator, *State* v. *Galbraith*, 150 Wash. 664; municipal officials, *Thompson* v. *Commonwealth*, 88 Va. 45, 46; *Corley* v. *State*, 162 Ark. 178, 181; town constables, *State* v. *Carter*, 106 La. 407; *State* v. *Petit*, 119 La. 1013, *Fellows's Case*, 5 Me. 333, 334–335; *State* v. *Cosgrove*, 16 R. I. 411; justices of the peace, *People* v. *Lange*, 90 Mich. 454, 455; *Evans* v. *State*, 13 Ga. App. 700 (though disqualified where he issued a warrant for defendant's arrest); *State* v. *Petit*, 119 La. 1013; *Glassinger* v. *State*, 24 Ohio St. 206; *State* v. *Lewis*, 31 Wash. 75, 77–78; coroners, *Jackson* v. *State*, 74 Ala. 26, 29; *O'Conner* v. *State*, 9 Fla. 215; *State* v. *Wright*, 53 Me. 328; school district officers, in a trial for forging school district orders, *State* v. *McDonald*, 59 Kan. 241, 244; and a county superviser, *State* v. *Adams*, 20 Iowa 486. In the two cases in the District of Columbia which were decided prior to the *Crawford* case, it was held that one who held "a subordinate office under the District of Columbia" and a "stamp agent", working for an annual compensation from the United States, were not disqualified. *United States* v. *Lee*, 15 App. D. C. 489; *United States* v. *Barber*, 21 App. D. C. 456, 471–472.

It results that in three States the public official has been held disqualified to serve as a juror in state cases where his connection was with the prosecuting or law enforcement branches of the government and actual bias was to be expected. But, with the possible exception of the *Crawford* case,

we have been able to find no case where the public employee, merely because of his employment by the government, has been held disqualified to serve as a juror in government cases. In eighteen States, one Circuit Court of Appeals, one territory, and the Court of Appeals of the District of Columbia (before the *Crawford* case) the public official has been held a qualified juror in government cases. It is plain that the rule of the English common law has been fully received into the American common law and that neither in England nor America is mere employment by the Government thought sufficient to disqualify the juror from serving in government cases.

6. Government Employees Are Qualified Jurors in Government Cases Irrespective of the Act of August 22, 1935

We believe that the only reasonable construction of the Act of August 22, 1935, is that it was intended not only to remove the exemption from jury service of the "salaried officers of the United States or of the District of Columbia" but was also designed to make Government employees and pension holders qualified jurors in Government cases (see pp. 15–16, *supra*). But it is conceivable that the Act may be construed as merely intended to remove this exemption, the specification of Government pension holders and contractors being added out of excess of caution. But we respectfully submit that if our analysis of the common law authorities is correct, and if this Court limits

or reexamines the decision in *Crawford* v. *United States*, 212 U. S. 183, the decision below must be reversed in any event, because the jurors who served in this case were qualified at common law, irrespective of the Act.

IV

EVEN HAD THE COMMON LAW FORBIDDEN A CROWN SERVANT TO SERVE AS A JUROR IN A CROWN CASE, THE ACT DOES NOT IMPAIR AN ESSENTIAL ELEMENT OF TRIAL BY AN IMPARTIAL JURY, AND THUS DOES NOT INFRINGE THE SIXTH AMENDMENT

1. Federal Decisions under the Sixth and Seventh Amendments

The Government believes that the common law authorities establish beyond question that the Crown servant was not for this reason alone disqualified to act as a juror in a Crown case. From this it inescapably follows that the Sixth Amendment cannot forbid Congress to authorize the use of disinterested Government employees as jurors in a Government case. However, since *Crawford* v. *United States*, 212 U. S. 183, may reasonably be construed to be a decision that the common law forbade a government employee to serve as a juror in any government case, it is thought desirable to demonstrate that, even if the common law rule as to servants of a party had been applicable to the Crown servant, the Sixth Amendment does not prevent the removal of this disqualification.

The *Crawford* case itself is persuasive authority that the Sixth Amendment does not prevent any modification of the common law which may be thought to inhere in the Act of August 22, 1935. There this Court held a juror to be disqualified in a prosecution for fraud of the Post Office Department because he operated a subpostal station in his drug store, receiving an annual compensation from the United States. The ground of the decision was that the Code of the District of Columbia did not supersede the entire body of the common law disqualifications of jurors and that at common law an employee of a party was not a qualified juror. But the opinion makes plain that, had there been a statute removing the disqualification, no objection could have been made to the presence of the juror. Mr. Justice Peckham, to indicate the importance of the question, said (p. 194):

> There may be statutes in the different States as to qualifications of jurors which in their construction would not prevent the application of the common law in regard thereto, and so the question of qualification being the same in the Federal as in the state courts (Rev. Stat. Sec. 800; 1 Comp. Stat., p. 623), may be a general one.

The implication is obvious that the Federal courts in States where this disqualification had been removed by statute would not be subject to the rule of the *Crawford* case. This implication is confirmed by the following passage (p. 195):

> We do not think that Sec. 215 of the code of the District includes the whole subject of the qualifications of jurors in that District. If that section, together with Sec. 217, were alone to be considered, it might be that the juror was qualified.

Finally, the Court summarized (p. 196) *Block* v. *State*, 100 Ind. 357, 362, the only case cited in support of the decision, as holding:

> * * * in accordance with the above rule of the common law, and that the Indiana statute upon the qualifications of jurors did not strike out the rule of the common law on the subject, *when not inconsistent with the statute.* (Italics added.)

It is believed that these passages speak with a clarity such that the *Crawford* case must be taken to establish, by way of dictum, that the Federal Constitution contains nothing to prevent employees of the United States from serving on juries in cases in which the Government is a party. It is, at the least, abundantly plain that the *Crawford* decision is, and was intended to be, wholly inapplicable to the Constitutional question raised by the statutory removal of the disqualification there established.

The dicta of the *Crawford* case have greater force when viewed against the body of constitutional law which has grown about the Sixth and Seventh Amendments. This Court has frequently stated the rule by which to determine whether a modification of the jury system infringes on the

constitutional guaranty of the jury known to the common law. As this Court has said of the Seventh Amendment, "its aim is not to preserve mere matters of form and procedure but substance of right." *Walker* v. *New Mexico & Southern Pacific Railroad,* 165 U. S. 593, 596. Again, speaking of the Seventh Amendment, this Court has declared, in *Ex parte Peterson,* 253 U. S. 300, 309–310:

> It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

Patton v. *United States,* 281 U. S. 276, 306, makes it clear that this rule is fully as applicable to the Sixth as to the Seventh Amendment. In upholding a conviction by a jury of eleven, to which the defendant had consented on the illness of the twelfth juror, the Court recognized that at common law there was no power to waive his right to a full jury, but stated:

> But this phase of the matter we do not stop to consider, for the rule of the common law,

whether exclusive or subject to exceptions, was justified by conditions which no longer exist; and as the Supreme Court of Nevada well said in *Reno Smelting Works* v. *Stevenson,* 20 Nev. 269, 279:

"It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a law when that reason utterly fails—*cessante ratione legis, cessat ipsa lex.*"

While the right to challenge for *actual* bias may well be said to be fundamental to trial by an impartial jury, *Lewis* v. *United States,* 146 U. S. 370, 376, the Government submits that any modification of the common law rule which was made by the Act of August 22, 1935, is well within the scope of the legislative freedom marked out by these decisions. It has been demonstrated in an earlier section (pp. 16–18, *supra*) that the Act of August 22, 1935, does not make the Government employee immune to the ordinary challenge for cause. The sole result of the Act is to make qualified a juror who, in a Government case, might be thought subject to a wholly theoretical bias in favor of the United States by virtue of his Government employment. If there be any factual support for the charge of bias, he is subject to challenge for cause.

Instructive analogies may be found in other decisions under the Sixth Amendment. It does not prevent a waiver of the right to have a petit jury of twelve, although such waiver could not be made at common law. *Patton* v. *United States, supra.*

The purgation of a contemnor by oath was a recognized curiosity of the common law when the Sixth Amendment was adopted, yet that Amendment does not forbid the abolition of this means of securing a jury trial on a charge of criminal contempt. *Clark* v. *United States,* 289 U. S. 1, 19; *United States* v. *Shipp,* 203 U. S. 563, 574–575.

The peremptory challenge has been described by this Court as "one of the most important of the rights secured to the accused", the Court adding that, "Any system for the empanelling of a jury that presents [*sic*] or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Pointer* v. *United States,* 151 U. S. 396, 408. Yet Congress has exercised unquestioned power in reducing the number of such challenges in non-capital felonies from the twenty allowed at common law (*Blackstone,* Commentaries, IV, 354; *Coke* on Littleton, 156b) to ten. Revised Statutes, sec. 819. The common law privilege that each co-defendant have his full number of challenges may be changed by Act of Congress so that the peremptory challenges must be exercised as though there were but one defendant. *Stilson* v. *United States,* 250 U. S. 583, 586.

At common law the juror who had formed an opinion as to the merits of the controversy was disqualified to serve as a juror (*Hawkins,* Pleas of the Crown, II, c. 43, sec. 28). Yet there is no denial of the impartial jury secured by the Sixth Amendment if the legislature or the Court recog-

nizes the changed conditions flowing from a widened circulation of newspapers and modifies this old disqualification. *Reynolds* v. *United States,* 98 U. S. 145, 155–157; *Hopt.* v. *Territory of Utah,* 120 U. S. 430, 432–436; *Spies* v. *Illinois,* 123 U. S. 131, 168–170; *Holt* v. *United States,* 218 U. S. 245, 248.

Similarly, although contrary to the common law procedure (see p. 24, *supra*), none has ever doubted the constitutionality of section 819 of the Revised Statutes, which provides that all challenges to jurors shall be tried by the Court.

The common law jury, of course, contained no woman among its members. But the Sixth Amendment has not prevented modification of this feature. *Tynan* v. *United States,* 297 Fed. 177 (C. C. A. 9th), certiorari denied, 266 U. S. 604; *Hoxie* v. *United States,* 15 F. (2d) 762 (C. C. A. 9th), certiorari denied, 273 U. S. 755; *Commonwealth* v. *Maxwell,* 271 Pa. 378.

Rules, suggested at a conference of the senior Circuit Judges, which materially restrict the scope of *voir dire* examination in requiring that it be done by the judge, do not impair the impartiality of the jury so chosen. *Kurczak* v. *United States,* 14 F. (2d) 109, 110 (C. C. A. 6th); *Bradshaw* v. *United States,* 15 F. (2d) 970, 971 (C. C. A. 9th); *Carroll* v. *United States,* 16 F. (2d) 951, 955 (C. C. A. 2d), certiorari denied 273 U. S. 763; *Falter* v. *United States,* 23 F. (2d) 420, 426 (C. C. A. 2d), certiorari denied, 277 U. S. 590;

Williams v. *United States,* 46 F. (2d) 731, 733 (C. C. A. 5th); *Paschen* v. *United States,* 70 F. (2d) 491, 495 (C. C. A. 7th).

At common law the alien, the better to secure an impartial trial, was entitled to have his case tried by a jury *de medietate linguae,* composed of six citizens and six aliens. *Bacon,* Abridgment, V, 359–362; *Blackstone,* Commentaries, III, 360–361.[45] In a few early cases in the federal and state courts such a jury was summoned. *United States* v. *Cartacho,* Fed. Cas. No. 14,738 (C. C. Va., 1823, Marshall, C. J., and Tucker, J.); *Respublica* v. *Mesca,* 1 Dall. 73 (O. & T., Phila., 1783). Yet, although the Sixth Amendment is fully applicable to aliens, *Wong Wing* v. *United States,* 163 U. S. 228, 238, it has not prevented the abolition of this type of jury as it existed at common law. *United States* v. *McMahon,* 4 Cranch C. C. 573, 26 Fed. Cas. No. 15,699 (C. C., D. C., 1835); 12 Op. Atty. Gen. 319; cf. *Kentucky* v. *Wendling,* 182 Fed. 140 (C. C., Ky.).

There has been allowed a similar leeway for development of the jury system in questions arising under the Seventh Amendment. While changes which are considered to be a material alteration of the common law division between the judge and the

[45] The fears of Blackstone that the Act of 3 Geo. II c. 25 might be construed to abolish this jury were not realized. See *Forsyth,* Trial by Jury, 228–230; *Thompson & Merriam,* Juries, secs. 16, 17. Not until 1870 was the jury *de medietate linguae* abolished by statute in England. 33 Vict., c. 14, sec. 5.

jury have been condemned, see *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364; *Dimick* v. *Schiedt*, 293 U. S. 474, there have nonetheless been a number of significant modifications which have been held not to alter the essential nature of the common law trial by jury.

Thus, the Amendment does not prevent a territorial legislature from enacting, contrary to the common law, that the judge might enter judgment in conformity with a special verdict and contrary to a general verdict. *Walker* v. *Southern Pacific Railroad*, 165 U. S. 593, 595–598 It does not prevent a preliminary hearing before an auditor empowered to make findings *prima facie* correct, although such an official was unknown to the common law jury trial. *Ex parte Peterson*, 253 U. S. 300, 307–311. The Amendment, notwithstanding the common law practice, does not prevent the appellate court from ordering a new trial on one issue alone. *Gasoline Products Co.* v. *Champlin Co.*, 283 U. S. 494, 497–499.

If these numerous modifications of the common law jury may validly be made under the Sixth and the Seventh Amendments, the Government believes that it follows as of course that the Sixth Amendment cannot forbid a modification (if it should be thought such) of the common law rule which does no more than to make qualified a juror subject to a wholly hypothetical bias and subject to challenge should there be any foundation in fact for this supposed bias. Any change, so far as the partiality of

the jury is concerned, is one in name only, one which leaves untouched the full right to challenge for actual partiality.

2. Statutes and Decisions of the States

The statutes and the decisions of the States have a very real importance in determining whether the Sixth Amendment operates to forbid any modification of the common law which may be thought to be contained in the Act of August 22, 1935. In the first place, as this Court has said, the constitution of each State contains a clause guaranteeing that the accused shall have a trial by an impartial jury. *Hayes* v. *Missouri,* 120 U. S. 68, 69.[46] Thus each decision and each statute represents a judgment of the court or the legislature that the constitutional requirement of an impartial jury has not been violated. This Court has testified to the importance which state constitutional decisions bear in ascertaining the content of the Sixth and Seventh Amendments. *Gasoline Products Co.* v. *Champlin Co.,* 283 U. S. 494, 497; *Patton* v. *United States,* 281 U. S. 276. In the second place, the acts and decisions, so far as they evidence any general tendency to modify the common law in a given direc-

[46] The statement is not literally correct. The word impartial does not appear in the constitutions of California (Art. I, sec. 7), Idaho (Art. I, sec. 13), Massachusetts (Part I, sec. 12), New Hampshire (Art. 16), New York (Art. I, sec. 2), North Carolina (Art. I, sec. 13), North Dakota (Art. I, secs. 7, 8); Utah (Art. I, sec. 10), or West Virginia (Art. III, sec. 14). However, none would doubt but that the requirement of impartiality is present by implication.

tion, show that the modification in question does not reach to the essentials of the impartial jury of the common law. Finally, Section 800 of the Revised Statutes makes the state laws as to the qualifications of jurors applicable to the Federal courts, *Pointer* v. *United States,* 151 U. S. 396, 407; *Crawford* v. *United States,* 212 U. S. 183, 194, so that the state practice may be taken to have been applied without objection in the federal courts.

The decisions of state courts relating to the service of government employees as jurors in government cases have been set forth in an earlier section (pp. 54–58, *supra*). No state court has held such an employee disqualified when he was connected with a branch of the government which had no interest in the outcome of the case. In eighteen States a public official has been held to be a qualified juror in a state case.

In numerous States the statutory grounds of challenge for implied bias are so phrased as to make it clear that the government employee is not for this reason subject to challenge in suits to which the State is a party. Thus, Section 377 of the New York Code of Criminal Procedure provides:

> A challenge for implied bias may be taken for all or any of the following causes, *and for no other:*
>
> 1. Consanguinity or affinity within the ninth degree, *to the person alleged to be injured* by the crime charged, *or on whose complaint the prosecution was instituted, or to the defendant;*

> 2. Bearing to him the relation of guardian or ward, attorney or client, or client of the attorney or counsel for the people or defendant, master or servant, or landlord or tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment or wages; * * * (Italics added.)

It will be noted that the master-servant relationship, as the other grounds of partiality, is carefully limited to the individuals figuring in the prosecution, and that the legislature had no thought that a similar relationship to the State could raise a presumption of bias. Substantially similar statutes, apparently modeled on the New York provision, have been adopted in ten other jurisdictions.[47] In four other States the statutes provide substantially the same grounds of challenge, save that the statutes do not expressly exclude other grounds.[48] However, the care with which the statutes limit the relationship chal-

---

[47] California Penal Code of 1872, sec. 1074; Idaho Code, 1932, sec. 19–1920 (2); Minnesota, Mason's Stats., 1927, sec. 10738; Montana, Rev. Code 1921, sec. 11960; Nevada, Comp. Laws 1929, sec. 10946; North Dakota, Comp. Laws 1913, sec. 10810; Oklahoma, Comp. Stat. 1921, sec. 2676; Oregon, Ann. Code 1930, vol. 1, sec. 13–916; South Dakota, Comp. Laws 1929, sec. 4857; Utah Rev. Stat. 1933, sec. 105–31–19.

[48] Arizona, Rev. Code 1928, sec. 5035; Arkansas, Crawford & Moses Digest 1921, sec. 3160; Iowa, Code 1931, sec. 13830; Kentucky, Carroll's Code 1927, Crim. Code, sec. 210.

lenges to the individuals appearing in the case justifies treating these States as excluding public employment as a grounds of challenge in state cases.

In result, our analysis of the state law shows that in two states challenges have (rightfully, we believe) been sustained to deputy sheriffs or to a deputy of the prosecuting attorney. Apart from these decisions, and six where a statute expressly excluded the public officer, no challenge, so far as we have been able to ascertain, has been sustained to a juror in a state case because of his public employment. In eighteen States there are judicial decisions and in fifteen States [49] there are statutes which make it clear that the juror's public employment is no bar to his service in state cases.

The Government has no doubt but that this general rule represents no departure from the common law. But if it be viewed as such, it is worthy of note that, in the absence of actual bias, it is a considerably less consequential modification of the jury system than other modifications which have never been thought to impair the impartial jury secured by the state constitutions. The general principle governing these modifications seems to be that the constitutional right to an impartial jury is wholly consistent with giving to the legislature full power to

[49] Three of these States are also represented in the group in which the rule is established by judicial decision.

prescribe the qualifications of jurors. *In re Mana,* 178 Cal. 213; *Commonwealth* v. *Dorsey,* 103 Mass. 412, 418; *Walter* v. *People,* 32 N. Y. 147, 159; *People* v. *Cosmo,* 209 N. Y. 91.

At common law a juror was disqualified if he was a member of the municipality or borough which was a party to the suit. *Coke* on Littleton, I, 157a. This rule has generally been abandoned.[50] At common law the juror was subject to challenge in principal if he were within the ninth degree of consanguinity or affinity to a party. *Coke* on Littleton, I, 157a; *Blackstone,* Commentaries, III, 363. The legislatures of many States have materially modified this rule,[51] and yet none has supposed that

---

[50] See, for example, Ala. Code, 1922, sec. 8664; *City of Prescott* v. *Sumid,* 30 Ariz. 347; Calif. Code of Civil Proc. 1931, c. 4, sec. 602 (5); Colo. Ann. Code of Civil Proc., sec. 199 (5); *Warner* v. *Town of Gunnison,* 2 Colo. App. 430; Fla. Comp. Gen. Laws, 1927, sec. 4451 (4); Ga. Code, 1933, sec. 59–715; *Pikeville* v. *Riddle,* 191 Ky. 231, 232; Maine Rev. Stat. 1930, c. 96, sec. 108; *City of Auburn* v. *Paul,* 110 Me. 192, 197–199; Mass. Ann. Laws, vol. 8, c. 234, sec. 30; *Commonwealth* v. *Ryan,* 5 Mass. 89; *Commonwealth* v. *Brown,* 147 Mass. 585, 591; Mich. Comp. Laws, 1929, sec. 14277; *Smith* v. *The German Ins. Co.,* 107 Mich. 270; *Detroit* v. *Detroit Railway Co.,* 134 Mich. 11; N. J. Comp. Stat. vol. 3, sec. 39; *Hildreth* v. *City of Troy,* 101 N. Y. 234; *Maddex* v. *Columber,* 114 Ohio St. 178; *Scranton* v. *Gore,* 124 Pa. 595.

[51] The modifications consist in reducing the degree. The statutory degrees vary from the third to the sixth. Alabama, Code 1923, sec. 8610; Arizona, Revised Code 1928, sec. 1905; Arkansas, Crawford & Moses Digest 1921, sec. 6334; California, Penal Code, sec. 1074; Colorado, Ann. Code Civ. Proc., sec. 199; Florida, Comp. Gen. Laws 1927,

in so doing they have deprived suitors of an impartial jury.

The common law similarly disqualified a juror who had formed an opinion as to the merits of the controversy (see pp. 64–65, *supra*). This rule has been widely modified by statute [52] and by decision,[53] so that the juror is generally eligible who satisfies the court that he can disregard his existing opinion should the evidence be to the contrary. The constitutionality of these statutes seems to be unquestioned at this time. See *Stokes* v. *People*, 53 N. Y. 164; *Hopt* v. *Territory of Utah*, 120 U. S. 430, 432–436.

---

sec. 4359; Idaho Code Ann. 1932, sec. 19–1920; Indiana, Burns' Ann. Stat. 1933, sec. 9–1504–4; Louisiana, Marr's Rev. Code of Practice, Art. 507 (1); Missouri, Rev. Stats. 1929, sec. 8771; Nebraska, Comp. Stat. 1922, sec. 10134; North Dakota, Comp. Laws 1913, sec. 7616; Oklahoma, Comp. Stat. 1921, sec. 2676; Oregon, Code Ann. sec. 2–207; South Dakota, 1929, secs. 2502, 4857; Tennessee, Williams Code Ann. 1934, sec. 9990; Utah, Rev. Stat. 1933, sec. 104–24–10; Vermont, Pub. Laws 1933, sec. 1237; Washington, 2 Rem. Rev. Stat. sec. 330; Wyoming, Rev. Stat. 1931, sec. 33–704.

[52] Arizona, Rev. Code 1928, sec. 5036; Arkansas, Crawford & Moses Digest 1921, sec. 3163; California, Penal Code, sec. 1076; Illinois Callaghan's Stats., c. 78, par. 14; Indiana Burns' Stats. Ann. 1933, sec. 9–1504; Mississippi, Code 1930, sec. 30; Montana, 1895 Code, sec. 2051; Nevada, Comp. Laws 1929, sec. 10948; New York, Code Crim. Proc., sec. 376; Tennessee, Williams' Code Ann., 1934, sec. 10008; Washington, Comp. Stat. 1922, sec. 331.

[53] See the numerous decisions collected in *Bishop*, New Criminal Procedure, II, 701–713.

The Government submits that any of these modifications of the common law jury system is fully as likely to affect the impartiality of the jury as is the mere declaration that a Government employee is a qualified juror in a Government case, when the employee remains subject to challenge for cause. Against a background of this nature it is not surprising that thirty States, by statute or decision, have ruled that there is no disqualification in Government cases attaching to the Government employee by the mere fact of his employment. No state court has ruled that a public official whose position bears no relation to the branches of the government interested in the outcome of the case is a disqualified juror in a state case. If the common law rule had ever been to the contrary, this unanimity of opinion would be evidence of the most persuasive character that declaring such a juror to be qualified constitutes no infringement of the constitutional guaranty of an impartial jury.

V

THE ACT DOES NOT DEPRIVE THE RESPONDENT OF DUE PROCESS OF LAW

Respondent, in his appeal to the court below, assigned as error the failure of the Police Court to hold the Act of August 22, 1935, to be a violation of the Fifth Amendment (R. 8). The court below considered only the Sixth Amendment (R. 8–14). Respondent apparently intends to urge the

Fifth Amendment in this Court (Memorandum of respondent, 3).

The Government believes that it has demonstrated that the Act does nothing to impair the defendant's right to challenge a juror who has actual bias (see pp. 16–18, *supra*), that the Act is necessary to the efficient operation of the jury system in the District of Columbia (see pp. 9–14, *supra*), and that it in no manner infringes on the guaranty of an impartial jury which is found in the Sixth Amendment. From this it follows *a fortiori* that it does not transgress the more general prohibition of the Fifth Amendment.

The Memorandum of Respondent (p. 3) raises the Fifth Amendment point in terms of a supposed objection to allowing the Government to challenge a juror in the employment of the private party, while denying the private party the privilege to challenge because of Government employment. It is not clear whether this objection relates to a supposed partiality of the jury so chosen or to an improper classification. If it be the former, the part of this brief which is directed to the Sixth Amendment affords a complete answer. If it be the supposed inequality of classification, it is necessary only to point out that any Government employee who had an interest in the outcome of the litigation comparable to that of a private employee would be subject to challenge for cause because of bias.

The Government is unable to isolate any substantial objection to the Act of August 22, 1935, on the grounds of due process, which is not more appropriately raised under the Sixth Amendment. If there be any such objection, it seems to be fully answered by the opinion of this Court in *Snyder* v. *Massachusetts,* 291 U. S. 97. Since the content of the due process clause of the Fifth Amendment is no broader than that of the Fourteenth Amendment, the summary statement of the Court (p. 105) is fully applicable to the present case:

> The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Twining* v. *New Jersey,* 211 U. S. 78, 106, 111, 112; *Rogers* v. *Peck,* 199 U. S. 425, 434; *Maxwell* v. *Dow,* 176 U. S. 581, 604; *Hurtado* v. *California,* 110 U. S. 516; *Frank* v. *Mangum,* 237 U. S. 309, 326; *Powell* v. *Alabama,* 287 U. S. 45, 67. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Consistently with that amendment, trial by jury may be abolished. *Walker* v. *Sauvinet,* 92 U. S. 90; *Maxwell* v. *Dow, supra; N. Y. Central R. Co.* v. *White,* 243 U. S. 188, 208; *Wagner Electric Co.* v. *Lyndon,* 262 U. S. 226, 232.

Indictments by a grand jury may give way to informations by a public officer. *Hurtado* v. *California, supra; Gaines* v. *Washington,* 277 U. S. 81, 86. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state. *Twining* v. *New Jersey, supra.* What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it. *Twining* v. *New Jersey, supra; Powell* v. *Alabama, supra,* pp. 68, 71; *Holmes* v. *Conway,* 241 U. S. 624. Cf. *Blackmer* v. *United States,* 284 U. S. 421, 440.

CONCLUSION

For the reasons which have been set forth in the foregoing, it is respectfully submitted that the judgment of the court below should be reversed and that of the Police Court should be affirmed.

STANLEY REED,
Solicitor General.
BRIEN MCMAHON,
Assistant Attorney General.
WILLIAM W. BARRON,
WARNER W. GARDNER,
Attorneys.

SEPTEMBER 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

FILE COPY

Office - Supreme Cou
FILED
MAY 11 19
CHARLES ELMORE C

No. [redacted] 34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

THE UNITED STATES OF AMERICA,
Petitioner,
v.
RAYMOND WOOD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

MEMORANDUM OF RESPONDENT.

ROBERT I. MILLER,
503 D Street, N. W.,
WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
Investment Building,
Washington, D. C.,
Attorneys for Respondent.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
Charles W. Warden, Washington Representative,
Tower Building.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 948.

THE UNITED STATES OF AMERICA,
Petitioner,
v.
RAYMOND WOOD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

MEMORANDUM OF RESPONDENT.

Respondent does not object to the granting of the Petition herein. We suggest however that the decision below seems clearly right. The mere fact that in the Federal courts the qualifications of jurors are the qualifications of jurors in the highest court of the State is no authority for the belief that Congress can make such

qualifications anything it wants. Congress in providing for the qualifications of jurors must operate within and not outside of the Constitution, in particular, Article III, Section 2, Clause 3, giving the right to trial by jury in criminal cases, the Sixth Amendment guaranteeing the right to trial by an *impartial* jury, and the Fifth Amendment guaranteeing due process of law. Two of these limitations do not obtain in the case of the States and as suggested by the late Mr. Justice Holmes in *Ashe v. United States,* 270 U. S. 424, the States can make pretty much anything they want Due Process in criminal cases, within, of course, obvious limitations. And so it may be that the States could provide by statute that employees were not disqualified by their employment in a criminal case involving their employer.

In the Federal law the opposite is true. The requirement of the Sixth Amendment that the jury shall be impartial necessarily restricts legislative activities. The right guaranteed must be viewed in the light it existed at the time of the enactment of the Constitution and its Amendments, at which time the relationship of employer and employee worked an absolute disqualification, and this was true at common law.(1) The basis of the disqualification is pointed out in *Crawford v. United States,* 212 U. S. 183, which is that where there is *interest* there is likely to be bias and prejudice, and the employee naturally has interest on the side of the employer. This situation cannot be remedied by any question put to the juror on the *voir dire* because as

(1). The requirement of impartiality goes back to the year 1150; see Beames' Granville, Beal's Ed., L. 2, c. XII; see also, Bracton Folio 185 A; Mirror of Justice, Ed. Robinson, chap. 3, Section 15, p. 153; Statute of 28 Edw. I; 25 Edw. III; V c. 3; 34 Edw. III, c. 4; Coke Litt., p. 155, Note d; p. 155-156, Note e. Blackstone states that at common law the relationship of employer and employee works an absolute disqualification and can be made the basis of a challenge for cause. 3 Black. Com., 358 et seq.

pointed out in several cases including the *Crawford* case the juror's answer being in the nature of a surmise as to his state of mind and prospective feelings, is untrustworthy. Therefore, unless there is an absolute disqualification there is no protection and this is probably the basis of the sensible common law rule.

Certainly the repeal of the common law disqualification and the destruction of a common law challenge for cause, which is what the present statute amounts to, leaves the defendant worse off with respect to getting an impartial jury than he was prior to the present statute and worse off than he was when the Constitution and the Amendments were enacted. This is sufficient. This Court has recently, in *Patton v. United States,* 281 U. S. 276, 289-290, reiterated its respect for the maintenance of trial by jury in all its traditional vigor. The present statute seems a clear diminution of the right within the meaning of this Court's holding in the *Patton* case.

Incidentally, the present statute is likewise discriminatory in violation of the Fifth Amendment. It must be remembered that the Government too has the right to challenge for cause in a criminal case. This right is left undisturbed by the present legislation, which, to even matters up, does not provide that employees of the defendant shall be conclusively presumed to be unbiased and qualified for jury service and not exempt therefrom. The Government, therefore, can challenge for cause employees of the defendant whereas the defendant cannot challenge for cause employees of the Government.

It might also be remarked that the present legislation renders qualified as jurors in a criminal case persons who have always, even at common law, been disqualified in ordinary civil cases.(1)

Conclusion.

We do not oppose the granting of the Petition herein. We feel, however, that the Court below was correct and that its opinion sufficiently takes care of the situation.

Respectfully submitted,

ROBERT I. MILLER,
503 D Street, N. W.,
WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
Investment Building,
Washington, D. C.,
Attorneys for Respondent.

---

(1) See, Central Ry. Co. v. Mitchell, 63 Ga. 173, 180; Temple v. Georgia Ry. Co., 82 S.E. 777, 779. See also as to various civil disqualifications in similar relationships:

Hufnagle v. Delaware etc., Co., 76 Atl. 205 (Pa.), 40 L.R.A.N.S. 978, employee of a corporation in an action against it.

Jones v. Ford, 134 N.W., 569 (Ia.), 38 L.R.A.N.S. 777, attorney and client.

Co. Litt., 1576; 3 Black. Com. 363; Tidd's Prac. (4th Amer. Ed. 853), master and servant.

Georgia Ry. Co. v. Tice, 50 S.E. 916 (Ga.), servants of lessee who are also servants of lessor.

5 Bacon's Abridgement, 352; Co. Litt., 158 A, 157 B, landlord and tenant, at common law.

Stone v. Monticello Construction Co., 40 L.R.A.N.A. 126, stockholder.

Walter v. Louisville Ry. Co., 150 S.W. 824 (Ky.), 42 L.R.A.N.S. 126, relativee of stockholders in a corporation.

Quay v Duluth Ry. Co., 116 N.W. 1001, 18 L.R.A.N.S. 250, cases of contractual relationship.

See Note L.R.A. 1915 A, 154 et seq., one interested in an indemnity company which would have to pay the judgment.

FILE COPY

Office - Supreme Court, U.
FILED
OCT 16 193
CHARLES ELMORE CROPL
CLERK

No. 34.

IN THE

Supreme Court of the United States

October Term, 1936.

THE UNITED STATES OF AMERICA,
PETITIONER,

v.

RAYMOND WOOD,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENT.

ROBERT I. MILLER,
503 D Street, N. W.,

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
Investment Building,
Washington, D. C.,
Attorneys for Respondent.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
Charles W. Warden, Washington Representative,
Tower Building.

INDEX.

Page

Outline Of Argument 1

I. The Factual Background: Over 75% of Government Employees in the District of Columbia Have Voting Residents Elsewhere and Are Ineligible for Jury Service 3

II. The Crown Servant Argument Is Unsound 5

III. This Court's Decision in Crawford v. U. S., 212 U. S. 183, Is as Good Law Today as It Was When It was Decided 15

IV. The Government's Argument that the Present Act Does Not Prevent Challenging Government Employees for Cause, (Gov. Brief, pp. 16-17) 23

V. The Present Legislation Renders Qualified as Jurors in a Criminal Case Persons Who Have Always Been Disqualified even in Civil Damage Suits 26

VI. The Government's Argument that Aside From the Common Law the Act Does Not Impair the Essential Element of Trial by an Impartial Jury, (Gov. Brief, ps. 59-74) 30

Conclusion 34

TABLE OF CASES.

Adkins v. Childrens' Hospital, 261 U. S. 525 32

Ashe v. U. S., 270 U. S. 424 30

Bickell v. State, (Okl.) 270 Pac. 88, 89 20

Block v. State, 100 Ind. 357 ..... 10, 18

Bunting v. Oregon, 243 U. S. 426 32

Central R. Co. v. Mitchell, 63 Ga. 173 ..... 10, 27

Continental Bank v. Rock Island Ry., 294 U. S. 648, 649 9

Crawford v. U. S., 212 U. S. 183; 30 App. D. C., 1 32 ..... 2, 3, 5, 15, 16, 20, 21, 22, 24, 26, 27, 30, 31, 32

Ex parte Peterson, 253 U. S. 300, 309, 310 31

Georgia Ry. Co. v. Tice, 50 S. E. 916 (Ga.) 29

Hubbard v. Rutledge, 57 Misc. 6 10

Hufnagle v. Delaware etc. Co., 76 Atl. 205 (Pa.) 40 L. R. A. N. S. 978 28

Hurtado v. California, 110 U. S. 516 13

Jones v. Ford, 134 N. W. 569 (Ia.), 38 L. R. A. N. S. 777 29

King v. Edmonds, (1821), 4 B & Ald. 471, 106 Eng. Rpt. 1009 6

Lewis v. U. S., 146 U. S. 370 ..... 20, 33

Lockhart v. State, 145 Md. 502, 125 A. 829 20

Louisville N. O. & T. Co. v. Mask, 64 Miss. 738, 2 So. 360 10

Page

Miller v. U. S., 38 App. D. C., 361 20
Muller v. Oregon, 208 U. S. 412, 419-421 32
O'Brien v. General Accident Co., 42 F. (2d) 50 28
Patton v. U. S., 281 U. S. 276, (1930) 15, 20
Pearce v. Quincy Min. Co., 149 Mich. 112, 112 N. W. 739 10
People v. Schweinler Press, 214 N. Y. 395 32
Quay v. Duluth Ry. Co., 116 N. W. 1001, 18 L. R. A. N. S. 250 29
Reg. v. Blakeman, 175 Eng. Rpt. 479 7
Reg. v. Lacey, (1848), 3 Cox Cr. C. 517-519 6
Reg. v. Tutchin, (1816), 14 St. Tr. 1095, 1101 6
Rex v. Genney, (1508), Keilw. 102 a 6, 7
Rex v. Hampden, (1683), 9 St. Tr. 1054, 1057-1061 ..... 6, 7
Rex v. Kirwan, (1812), 31 St. Tr. 543 6
Rex v. Parkyns, (1695), 13 St. Tr. 163 6
Rex v. Rowan, (1793), 22 St. Tr. 1034, 1037-1039 6
Reynolds v. U. S., 98 U. S. 145 24
Schick v. U. S., 195 U. S. 68 10
Snyder v. Masse, 291 U. S. 97 30
State v. Dushman, (W. Va.) 91 S. E. 809, 810 21
Stettler v. O'Hara, 243 U. S. 629 32
Stone v. Monticello Construction Co., 40 L. R. A. N. S. 978, note 29
Temples v. Georgia Ry. Co., 82 S. E. 777, 779 (Ga.) 27
United States v. Griffith, 55 App. D. C., 123 ..... 20, 21
United States v. Marchant, 4 Mason, 160, 162 ..... 20, 33
Walker v. New Mexico & Southern Pacific R. Co., 165 U. S. 593, 596 30
Walter v. Louisville Ry. Co., 150 S. W. 824 (Ky.) 42 L. R. A. N. S. 126 29

MISCELLANEOUS.

Bacon's Abridgement, 352 29
Bacon, Matthew 6, 7, 29
1 Bishop, New Crim. Proc., Sec. 902 10
3 Black. Com. 363 ..... 10, 11, 27, 29
4 Black. Com. 353 ..... 11, 20, 27, 33
Chief Justice Brooke 6
Chief Justice Rolle 6, 7
1 Chitty, Crim. Law 541, 542 ..... 6, 10
Coke 6, 7, 29
Coke Litt., 1576 29
Coke Litt., 158A, 157B 29
Constitution, Article 3, Section 2, Clause 3 ..... 2, 8
Constitution, Sixth and Seventh Amendments 2, 5, 8, 15, 32
3 Cooley's Bl. Com. 4th Ed. p. 363 18
District Code, Sections 215 and 217 ..... 16, 17

Page

Duncombe 6, 7
Fitzherbert 6, 7
Hargrave 6
Hawkins 6, 7
Lecky, Engl. 18th Cent., Vol. 3, ps. 394-395 13
Lord Hale 6, 7
L. R. A. 1915A, 154 et seq., note 29
16 Ruling Case Law, p. 273 28
Staunforde 6, 7
"The Business of the Supreme Court" by Frankfurter and Landis 32, 33
Tidd's Prac., 4th Amer. Ed. 853 29
Thompson & M. Juries, p. 176 27
Viner 6
Year Book, (1346), 19 Ass. 62 Pl. 6, 639 ..... 6, 7
Year Book, 4 Henry VII, 8 P. pl. 7 6
Year Book, 4 Henry VII, 3 H. pl. 5 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 34.

THE UNITED STATES OF AMERICA,
PETITIONER,
v.
RAYMOND WOOD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT.

Outline of Argument.

As over 75% of Government employees in the District of Columbia maintain legal or voting residences elsewhere they are in practice ineligible for jury service and so the argument based upon convenience has no great weight.

Even assuming that at common law Crown Servants could sit on criminal juries, this does not necessarily mean that a jury so composed constitutes an impartial

jury within the meaning of the Sixth Amendment. The reason for ruling out challenges for favor to Crown Servants, namely, that they were *supposed* to be favorable to the King, "because of their obedience" has no place in the American legal system, our political and legal structure being dominantly democratic not feudal or royalist in character. It seems extremely unlikely that the Colonists at the end of a successful rebellion against royal prerogative and misrule would wish to incorporate into their Constitution a discrimination in favor of the State in a criminal case.

This Court's decision in *Crawford v. U. S.*, 212 U. S. 183, does not, as applied to the present case, depend solely upon whether Crown Servants were qualified or disqualified at common law. The guarantee of the Sixth Amendment is not the guarantee merely of trial by jury as known at common law. This was already secured by Article 3, Section 2, Clause 3. The guarantee of the Sixth Amendment was the right to trial by an *impartial* jury. This Court's reasoning in *Crawford v. U. S., supra,* to the effect that where there is *interest* flowing from the relationship of employer and employee, bias or prejudice might creep in, is as sound today as when it was uttered. Further, this Court's argument in that case that a jury composed of few or many Government employees would not conduce to respect for, or belief in, the fairness of the system of trial by jury is equally true today, no matter what the common law was with respect to Crown Servants. The oath of this Court and its counsellors to support the Constitution of the United States requires the preservation not only of the right to an impartial jury under

the Sixth Amendment but the preservation of confidence in and respect for the institution of trial by jury, for once the public confidence in it vanishes the institution itself will be quick to follow.

The Government's contention that the Act does not destroy the right to challenge Government employees for actual bias or prejudice seems beside the point. Unless such employees can be challenged solely *because* they are Government employees the examination on the *voir dire* will result in an attempt to explore the juror's mind not on the basis of ascertained facts, but on the basis of imponderables far beyond the capacity of the average juror to take into consideration. As this Court said in *Crawford v. U. S.*, the juror might lean to the Government's side without realizing it. Asking a Government employee on the *voir dire* whether he thinks he can give the defendant a fair trial calls for a mere surmise as to his present and future feelings. As the present Statute constitutes the repeal of existing safe-guards it certainly leaves a defendant worse off than before, which means a diminution of his constitutional right. This should be enough.

I.

The Factual Background: Over 75% of Government Employees in the District of Columbia Have Voting Residences Elsewhere and Are Ineligible for Jury Service.

We do not quarrel with the Government's statistics indicating that 44.3% of all the eligible jurors in the District of Columbia are Government employees, (Gov.

Brief, p. 14), making it likely that from 5 to 6 Government employees will sit on every jury. We wish however to suggest that the Government fails to take into account the fact that a very large number of the Government employees in the District of Columbia maintain voting residences in their home States. This is particularly true at the present time when a determined effort is being made to "get out the vote" of all these Government employees living here but legally residing elsewhere. These persons are not eligible for service on juries in the District of Columbia, and in practice once the Jury Commission finds a Government employee has a legal residence elsewhere and votes there, it strikes his name off the jury list. The Jury Commission informs counsel herein that, from its experience, in excess of 75% of Government employees in the District of Columbia possess legal residences elsewhere, and are hence ineligible for jury service. From a practical viewpoint, therefore, the only good done by the present Act lies in rendering eligible for jury service the remaining small percentage of Government employees, a remainder, we suggest, which is steadily diminishing in proportion to their dawning realization that their best interests lie in their being "good citizens" and going home to vote.

It is only fair, of course, to admit that this argument works both ways. Whereas under the Government's statistics the number of Government employees on any given jury would *average* five or six (exactly the proportion in the present case), and so in some cases would run to ten or even twelve (a recent jury had twelve), under Respondent's data relative to absentee voting, the average on a jury would be only around three.

Further argument on the factual basis of the present Act seems unnecessary not only from this angle but also from the viewpoint that after all an argument based on the convenience of the Jury Commission (which is all the argument amounts to) is only entitled to be listened to up to a certain point. When it begins to impinge upon principle and essential human rights the argument from convenience must fall. It is the purpose of the present Brief to show that however convenient for the Jury Commission of this District to obtain large numbers of Government employees as jurors, such convenience should not outweigh the probability of weakening or destroying the traditional right to trial by an impartial jury under the Sixth Amendment.

II.

The Crown Servant Argument is Unsound.

This Court held squarely in *Crawford v. U. S.*, 212 U. S. 183, that at common law the relationship of master and servant operated as an absolute disqualification of a juror and constituted a principal cause of challenge. The Government now contends that while this was true generally, it was not true with respect to the King's Servants; that the servants of the king could sit on juries in criminal cases and could not be challenged in principal on the ground that they were the King's Servants. There seems some question as to whether they could be challenged even for favor under some of the authorities cited by the Government.

The following gives a rough analysis of the Government's authorities on the right to challenge a King's Servant:

Author:	Challenge In Principal	Challenge To Favor	Government's Brief Page
Fitzherbert	No	Yes	27-29
Chief Justice Brooke	No	No	29
Staunforde	No	Yes	30
Coke	No	No	30-31
Lord Hale	No	Yes	32
Chief Justice Rolle	No	Yes	32-33
Duncombe	No	No	34
Hawkins	Doubtful	Doubtful	35
Matthew Bacon	Doubtful	Doubtful	36
Viner	No	Yes	36
Hargrave	No	No	36-37
Chitty	Doubtful	Yes	37-38
The Cases:			
Year Book (1346) 19 Ass. 62, pl. 6	No	No	39
Year Book, 4 Henry VII 8, P. pl. 7	No	No	40
Year Book, 4 Henry VII, 3 H. pl. 5	No	No	40
Rex. v. Genney, (1508) Keilw. 102 a	No	No	42
Reg. v. Tutchin, 14 St. Tr. 1095, 1101, (1816)	Doubtful	No	42
Rex v. Hampden, (1683) 9 St. Tr., 1054, 1057-1061	No	Not decided	43-44
Rex v. Parkyns (1695) 13 St. Tr. 163	No	No	44
Rex v. Rowan (1793) 22 St. Tr. 1034, 1037-1039	No	No	45
Rex v. Kirwan, (1812) 31 St. Tr. 543	No	Not decided	45-46
King v. Edmonds, (1821) 4 B. & Ald. 471, 106 Eng. Rpt. 1009	No	No	46
Reg. v. Lacey, (1848) 3 Cox Cr. C. 517-519	No	Not decided	47-48

From the above it seems that nineteen authorities hold that these is no principal cause of challenge against a Crown Servant; that twelve authorities hold that there is not even any challenge for favor. Fitzherbert, (p. 29), Coke, (p. 31); and Rex v. Hampden, 9 St. Tr. 1054, 1057, 1061, (p. 43) allow challenges for favor in respect of menial servants. Actual malice as distinguished from favor was allowed as a challenge by: Staunforde, (p. 30); Lord Hale, (p. 32); Duncombe, (p. 34); Hawkins, (p. 35); Matthew Bacon, (p. 36); Year Book 19 Ass. 62 Pl. 639, (p. 39); Rex v. Genney, Keilw. 102 a, (p. 42); Reg. v. Blakeman, 175 Eng. Rpt. 479, (p. 42). Brooke allowed no challenge of any kind for the defendant but challenge of either kind for the king's side, (pp. 29-30).

The reasons why Crown Servants were not challengeable are given as follows:

Staunforde: "Because he should favor the King by reason of his obedience", (p. 28);

Coke: "Because in respect of his allegience he ought to favor the King more", (p. 31);

Duncombe: Same as Coke, (p. 34);

Rolle: "He ought to favor the King more by reason of his obedience", (p. 34);

Hawkins: "Because everyone is bound by his obedience to favor the King", (p. 35);

Bacon: Same as Hawkins, (p. 36).

Based on this alleged exception at common law the Government argues that if the common law concept of a jury trial connoted that Crown Servants could act as jurors, the Sixth Amendment guaranteeing an impartial jury meant no more than the English jury at

common law. We do not agree with this reasoning. If the Government takes this position it must affirmatively show that the Colonists recognized the exception in favor of the King's servants at the time the 6th Amendment was formulated. No authorities to this effect have been cited. Further, what constituted a jury trial at common law is only a partial guide to what was intended by the constitutional guarantee. The guarantee of the Sixth Amendment does not stop at guaranteeing a jury trial; this was already guaranteed by Article 3, Section 2, Clause 3 of the Constitution. The guarantee of the Sixth Amendment was that the accused should be entitled to trial by an *impartial* jury. The word "impartial" is entitled to some weight. At common law there was no such express guarantee. If the Government authorities are correct it might well be that at common law Crown Servants could not be challenged like other servants on the ground that they owed obedience to their master, and hence were disqualified in a case involving their master. The common law reasoning, from the Government's authorities, seems to be that, naturally, Crown Servants owed obedience to their master, the king, and that this was no ground for holding them disqualified. But this is not a declaration that juries thus composed were impartial juries within the meaning of the Sixth Amendment; it is simply a statement that, rightly or wrongly, common law juries in England could be composed of Crown Servants and a defendant must take them willy-nilly.

We do not believe that what existed with respect to jury trial at common law is the sole test of what constitutes an impartial jury within the meaning of

the Sixth Amendment. The Government has pointed to no substantial authorities in support of such a contention. *Continental Bank v. Rock Island Ry.*, 294 U. S. 648, 669, is cited as stating that the guarantee of trial by an impartial jury under the Sixth Amendment "has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recognized in this country and England, when the Constitution was adopted." But the true meaning of this statement, and it is only dictum in the Continental Bank case, is that to live up to the constitutional guarantee the trial must have *at least* the elements of the particular form of trial at common law. There may be additional elements required, as in the present case, in accordance with the changed political structure of the United States. This certainly is no Government of paramount royal power. In addition, if the particular wording of this dictum is relied upon to support the elaborate argument based upon it, it should be pointed out that the trial must be in accordance with the "settled" rules of the common law. The Government's Brief herein shows that the rules at common law with reference to challenges of master and servant were anything but settled. Further, the dictum in the Continental Bank case is careful to say that the trial in question must possess all the essential elements "recognized in this country and England when the Constitution was adopted". No authority is pointed to by the Government showing that the alleged exception as to Crown Servants with respect to the master and servant disqualification was generally recognized in this country when the Constitution was adopted. Blackstone, cited by this Court in

the Crawford case as authority for holding that the relationship of master and servant operated as an absolute disqualification, makes no exception whatever with respect to Crown Servants. Nor do the other authorities submitted to this Court by counsel for the defendant in the Crawford case[1] contain any such distinction.

We think, therefore, the ancient authorities are not particularly helpful. It is not the dried up mummy of the common law, unearthed today by legal archaeologists, which is supposed to preserve in embalmment our liberties as set forth in the Bill of Rights. It is the living and breathing common law as known to the colonists. If so we know of no better guide than the authority of Blackstone, cited by this Court in the Crawford case. This Court in *Schick v. United States,* 195 U. S. 68 has stated that, for Constitutional construction, Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England, the reason being that their wide circulation in the United States prior to the Revolution familiarized colonists with Blackstone's statement of the common law. It is logical, therefore, when we attempt to ascertain the meaning of common law terms in the Constitution to resort to the authority from whom the colonists had derived for the most part their knowledge of the common law. It would be a curious way to ascertain what these colonists intended in their references to

(1). These authorities were:
3 Bl. Com. 363;
1 Chitty, Crim. Law, 541; 542;
1 Bishop, New Crim. Proc., Sec. 902;
Block v. State, 100 Ind. 357;
Central R. Co. v. Mitchell, 63 Ga. 178;
Hubbard v. Rutledge, 57 Miss. 6;
Louisville N. O. & T. Co. v. Mask, 64 Miss. 738; 2 So. 360;
Pearce v. Quincy Min. Co., 149 Mich. 112, 112 N. W. 739

the common law to resort to authorities they had never heard of such as Year-Books published in Norman French centuries before, Latin abridgements, or little known commentators.

If, in spite of the evident importance of impartiality, the Government's authorities are correct and a defendant was compelled to take the King's Servants, good, bad or indifferent, and could not challenge them in principle because of their position, or even for favor as some of the authorities appear to hold, we can only say that the common law fell short of the desired ideal. This is no reason for our making the same mistake and restricting the phrase "impartial jury" in the Sixth Amendment to connote a jury which excludes those in relationship of master and servant so far as private parties are concerned, but compels us to take the King's Servants where the king is concerned. The practical result of the English doctrine applied in this country would be that a defense challenge based upon the relationship of master and servant would never exist at all in this country in criminal cases, all prosecutions in this country being undertaken not by a private party but by the public prosecutor.

It seems to us that the best clue to what the colonists meant by the impartial jury provided for in the Sixth Amendment is what constituted an impartial jury in their opinion at that time, and the best clue to this is Blackstone who makes no distinction in favor of the crown in excluding those who are master and servant. A moment's reflection will convince this Court of the unlikelihood that the American colonists, recently emerged from a civil war devoted to assailing the

royal prerogatives and privileges, would in framing a constitution desire to protect and reincorporate into their law one of the silliest and most baseless of all the so-called royal privileges, namely, the royal right, if the Government's authorities are correct, to have friends at court on any jury trying a criminal case. It is reasonable to suppose that had the colonists been aware of any such curious pretense of privilege on the part of the State there would have been a quick outcry. The silence of the records of the Constitutional Convention and other sources like the Federalist is an indication that the colonists did not intend to put the new American Government in any favored position in any struggle at law with its citizens. It seems, too, a curious approach to the problem of whether Government employees upon a jury constitute an impartial jury within the meaning of the Sixth Amendment to rely upon the practice of putting Crown Servants on criminal juries in England, which practice the Government's own authorities show was grounded upon the medieval English theory that it was somehow *lése-majesté*, even to hint that the loyalty of the Crown Servant to his king was something less than a form of slavery of mind and will. As the Government shows, the challenge that the "sheriff favored the king more than the party, * * * was held to be of no significance *for he should do so by reason of his obedience*", or "because every one is bound by his obedience to favor the king". (Government's Brief, pp. 28, 35. Italics ours.) It is a strange form of obedience to exalt the general allegiance of a Crown Servant to the king above his particular duty and oath to be fair in a judicial proceeding. It seems far removed from the enlightened type of fairness contemplated by the guarantee of

the Sixth Amendment of an impartial jury. If, in the Tudor times in question (referred to by Lecky as one of the darkest periods in English history, Lecky, Engl. 18th Cent., Vol. 3, 394-395), the struggle for human liberty had not gotten beyond the point at which it was considered not only not discreditable but in fact praiseworthy for a sheriff to pick a jury favorable to the king, "because he owed him his obedience", we can only quote this Court's remarks in *Hurtado v. California,* 110 U. S. 516, that it would be better "not to go too far back into antiquity for the best securities for our 'ancient liberties' ".

Exhaustive and interesting as the Government's investigation of the ancient authorities is on the practice of permitting Crown Servants to sit in criminal cases we think it a plowing of barren fields. Political and legal morality more or less keep pace with each other: Bacon, Raleigh and Pepys took bribes and no one apparently thought the worse of them, at least not until they began to be bribed "to excess". Similarly, the power and prestige of the English crown may have been so great that the King's Servants were supposed to be unfair, but not unfair "to excess".

The Government's argument in its Brief (Government's Brief, p. 18), that if we disqualify a Government employee who owes his livelihood to the Government we might as well disqualify a Federal Judge who is in the same position overlooks the fact that this is an imperfect world and we have to work with the human tools available and at our hands. We have

done the best we can with the Federal Judges by making them independent of removal for life. We cannot do the same for our jurors though we might like to. But we can do the next best thing, that is, we can take jurors who will have no temptation to be favorable instead of those who might or might not have inclinations the Government's way. The Government of the United States is a very large institution but sometimes it may appear to be a very soul-less institution, or a particular juror might think it so, which amounts to the same thing. Constitutional guarantees are formulated not for cases wherein anyone with any sense would realize they were unnecessary, but to be on the safe side—for the exceptional cases wherein without the guarantee in question injustice would be done. We know of no conclusive reason why a Government employee might not favor the Government, not necessarily from fear or hope of reward but imperceptibly, because of his mode of life and of thought. If there were any way to find out exactly how he stood we might say that the requirement of an impartial jury was not violated by taking him. But as will be shown in the present Brief in Point III in discussing the Crawford case wherein this Court considered this very point, no way exists on the *voir dire* to explore the juror's inclinations in favor of or against the Government. Any such exploration would seem to start with the presumption that he was at least slightly favorable to the Government because of his mode of life, settled habits of respect and because of his own and his children's bread. This ought to be enough.

III.

This Court's Decision in Crawford v. United States, 212 U. S. 183, Is as Good Law Today as It Was When It Was Decided.

We think it may be fairly charged that the Government has made no attempt to overcome the reasoning of *Crawford v. U. S.*, except upon the theory that this Court had misconceived the doctrine of the common law with reference to the King's Servants. The point is, however, that the decision of the Crawford case is only partly based on this ground. This Court and the attorneys on both sides of the present case have taken their oaths to "support and defend the Constitution of the United States", which includes the duty to preserve the right to trial by an impartial jury in all its traditional vigor. This Court's decision in the Crawford case represents an effort to preserve that right. Constitutional guarantees, this Court has frequently intimated, are to be guarded against erosion as well as against open assault. As late as *Patton v. U. S.*, 281 U. S. 276, (1930), this Court reiterated its faith in the American system of trial by an impartial jury. Its efforts to protect and preserve that trial need no justification based upon the common law. Independently of the common law this Court has power to hold that the trial of crimes in this country by a jury containing from one to twelve Government employees does not constitute trial by an impartial jury within the meaning of the Sixth Amendment. This is fairly inferable from the Crawford decision.

In *Crawford v. United States, supra,* Crawford was indicted and tried in the Supreme Court of the District

of Columbia for violation of the conspiracy statute. In the course of empaneling the jury one Haley was called as a juror and sworn upon his *voir dire*, and stated that he was a druggist *and did not know the defendant and had formed no opinion about the case;* that his drug store was a subpostal station, and that he was the clerk in charge and technically a clerk of the city subpostoffice; that he was paid $300.00 a year as compensation which included all clerical hire and rental of the premises and the entire service of taking charge of the sub-station; that this was one of the things in the drug business which could hardly be avoided, and that a drug store to keep up its prestige must sell postage stamps and might as well get paid for it as do it for nothing (pp. 192-193). Defendant thereupon challenged Haley for cause, the objection stated being that he was "a salaried officer of the Government." The challenge was overruled. During the organization of the jury the defendant exhausted his peremptory challenges and Haley sat as a member of the jury (p. 193).

It should be noted that exactly the same process was followed in the present case, except that the defendant challenged the Government employees and the pensioner twice, both prior to and after the exhaustion of the peremptory challenges. Further, the *form* of the challenge in the *Crawford* case, *i. e.*, that Haley was *a* salaried *officer* of the Government was less formal and precise than the challenges in the present case.

In ruling upon the question in the *Crawford* case this Court referred to Sections 215 and 217 of the District Code. Section 215 read then exactly as it does today; and Section 217 read exactly as it was prior to

the Act of August 22, 1935, which now constitutes the second paragraph of Section 217 and purports to render qualified Government employees. The Court adverted to the Government's contention that, under Section 217, Haley was not "an officer of the Government" and stated that the objection to the juror was evidently by reason of his relations to the Government, however described (p. 194). The Court held that the general character of the objection to the juror was fairly before the court, and that the question of the qualifications of a juror in the District of Columbia was an important one. The Court said:

> "It is of special importance in this District, where there are so many thousands of clerks and employees of the government, to know whether they are qualified jurors * * * to sit on the trial of cases to which the government is a party. If they be so qualified it might not be cause for much astonishment to see in this District a majority of a jury composed of such jurors.
>
> "Taking the contention of the government to be sound, the fact that a proposed juror is a salaried officer of the government can only be ground for his own claim of exemption, which, if not made by him, leaves him a competent juror. A jury composed of government employees *where the government was a party to the case on trial would not in the least conduce to respect for, or belief in, the fairness of the system of trial by jury.* To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, *but that they should not occupy such relation to either side as to lead, on that account, to any doubt on that subject.* We do not think that Sec. 215 of the Code of the District includes the whole subject of the qualifications of jurors in that District. If that section, together with Sec. 217, were alone to be considered, it might be that the juror was qualified. But by the common law, a

further qualification exists. If that law remains in force in this regard in this District a different decision is called for from that made in this case. The common law in force in Maryland, February 27, 1801, remains in force here, except as the same may be inconsistent with or replaced by some provision of the Code for the District. Code, chap. 1, Sec. 1, p. 5. It has not been contended that the common law upon the subject of jurors was not in force in Maryland at the above-named date, or that it did not remain in force here, at least up to the time of the passage of the Code. Jurors must at least have the qualifications mentioned in Sec. 215, but that section does not, in our opinion, so far alter *the common law* upon the subject as to exclude its rule that one is not a competent juror in a case if he is master, servant, steward, counselor, or attorney of either party. In such a case a juror may be challenged for principal cause as an absolute disqualification of the juror. 3 Cooley's Bl. Com. 4th ed. p. 363; Block v. State, 100 Ind. 357, 362." (pp. 195-196; Italics ours.)

The Court then refers to the dissenting opinion of Mr. Chief Justice Shepard of this Court wherein various civil cases were cited to the effect that a clerk or employee of a private party was not competent to sit on a civil jury involving the employer's case. The Court then says:

"Although the cases cited were civil cases and rest mainly on the common law, they are not lessened in weight on that account. On the contrary, they apply with added weight to criminal cases. Modern methods of doing business and modern complications resulting therefrom *have not wrought any change in human nature itself,* and therefore have not lessened or altered the general tendency among men, *recognized by the common law,* to look somewhat more favorably, *though perhaps frequently unconsciously,* upon the side of the person or corporation that employs them, rather than upon the other side. *Bias or prejudice is such an elusive*

condition of the mind, that it is most difficult, if not impossible, to always recognize its existence, and *it might exist in the mind of one* (on account of his relations with one of the parties) *who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.* The law therefore most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, *bias is implied,* and *evidence of its actual existence need not be given.* "The position of the juror in this case is a good instance of the wisdom of the rule. His position was that of an employee who received a salary from the United States, and his employment was valuable to him, not so much for the salary as for the prospect such employment held out for an increase in his business from the people who might at first come to his store for the purchase of stamps, etc. It need not be assumed that any *cessation* of that employment *would actually follow* a verdict against the government. It is enough that it *might possibly be the case;* and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, *even though he should swear* he would *not be influenced* by his relations to one of the parties to the suit in giving a verdict. It was error to overrule the defendant's challenge to the juror." (pp. 196-197; Italics ours.)

We emphasize this Court's remark above quoted:

"A jury composed of government employees *where the government was a party to the case on trial would not in the least conduce to respect for or belief in, the fairness of the system of trial by jury.* To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, *but that they should not occupy such relation to either side as to lead, on that account, to any doubt on that subject."* (Italics ours.)

This statement is as true today as it was when it was uttered. A jury containing from one to twelve Government employees would always, we feel, be suspect. In *Patton v. U. S.*, 281 U. S. 276, 312, this Court stated that the right of the accused to a trial by a constitutional jury must "be jealously preserved", and the maintenance of the jury as a fact finding body was stated to be "of much importance in our traditions". Any diminution of the respect due that institution is akin to a diminution of the constitutional right itself by lessening the prestige of the body resorted to. (1)

The decision of this Court in the Crawford case was followed in *U. S. v. Griffith*, 55 App. D. C., 123, wherein the Court of Appeals affirmed the lower Court which held strongly that a Government employee receiving disability compensation was ineligible for jury service. The Court said:

> "Can it be seriously contended that the juror named had freedom of mind; or that he stood indifferent as he stood unsworn; or that his membership on the panel *was favorable to an impartial jury*", (Rec. in *U. S. v. Griffith*, No. 4114, October Term, 1924, Court of Appeals, D. C.).

To the same effect is *Miller v. U. S.*, 38 App. D. C., 361. Cases applying and approving the decisions above referred to are *Bickell v. State*, (Okl.), 270 Pac. 88, 89, wherein a depositor of a failed bank was held disqualified as a juror upon a trial of the defendant for violating the State laws in the conduct of the said bank; *Lockhart v. State*, 145 Md. 502, 125 A. 829, involving a

(1). Blackstone's remark (quoted by Justice Storey) is interesting. Discussing the reason for peremptory challenges he speaks of "how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him". (4 Black. Com., 353, quoted with approval in U. S. v. Marchant, 4 Mason, 160, 162; Lewis v. U. S., 146 U. S. 370). One would think that seeing twelve Government employees in the box would be sufficiently disconcerting.

juror who was the office manager for an employer who was a creditor of the defendant's firm; and *State v. Dushman,* (W. Va.), 91 S. E. 809, 810, wherein the employee of a railroad was held disqualified as a juror on a trial for one indicted for larceny from the railroad.

From the above it appears that the Courts in *Crawford v. U. S., supra,* and in *U. S. v. Griffith, supra,* and other cases, have held that persons more remotely indebted to the United States for their livelihood than the three jurors complained of in the present case are ineligible for jury service. In *Crawford v. U. S., supra,* this Court based its decision not upon the ground that the juror in question favored the United States *in fact.* On his examination on the *voir dire* the juror in question stated under oath that he did not know the defendant and had formed no opinion about the case. The basis of this Court's decision was not that the juror was or would be biased or prejudiced in fact, but that by reason of his obligation to the United States he might subconsciously lean toward the side of the United States without realizing it. As the Court says in the Crawford case:

> "Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist *in the mind* of one (on account of his relations with one of the parties) who was *quite positive* that *he had no bias,* and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law, therefore, most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given." *(Crawford v. U. S.,* pp. 196-197. Italics ours.)

The Court then goes on to say that it need not be assumed that any harm would come to the juror if he should join in a verdict against the Government. The test is that it might *possibly* be the case, and that the juror ought not to be permitted to occupy the position of that nature to the possible injury of a defendant on trial "even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict." *(Crawford v. U. S.*, p. 197.)

To the same effect is Mr. Justice Shepard's statement in his dissenting Opinion in *Crawford v. U. S.*, 30 App. D. C., 1, 32, cited with approval by this Court in *Crawford v. U. S., supra:*

> "It does not matter that he had the self-confidence to swear that he could try the cause impartially. *It was not for him to determine his competency on that point.* When the fact was developed that he was in the employment of appellant the *law adjudged him incompetent.* The law does not lead jurors into the temptations of a position where they may secure advantage to themselves by doing wrong, nor permit the possibility of the wavering balance being shaken by self-interest." (30 App. D. C., p. 33. Italics ours.)

It follows from the above that the basis of the *Crawford* decision is not in the *fact* of the juror's bias or lack of bias, or what the juror thinks is the fact. The Court says that the juror is an entirely unreliable witness, because he may be prejudiced without knowing it. Therefore, the Court states that the law excludes him as a juror because he must not be permitted to occupy a position to the possible injury of a defendant no matter how he may surmise his own state of mind. In brief, this Court holds that a juror in the employ of one of the parties is not eligible material from which to build up an *impartial jury.*

IV.

The Government's Argument that the Present Act Does Not Prevent Challenging Government Employees for Cause. (Gov. Brief, pp. 16-17.)

This is simply a truism. Anyone knows that the Act does not prevent challenging a Government employee for extrinsic cause. It simply prevents challenging a Government employee on the ground that *he is a Government employee.* Even at first glance it would seem that the destruction of this challenge is a diminution of the defendant's rights. Prior to the passage of the present Act Government employees could be filtered out by a defendant's challenges. The Government now contends that they cannot be or should not be, but that the defendant can still challenge them "for cause," such as that he was an employee of the prosecuting branch of the Government. (Gov. Brief, p. 16.)

It is noticeable that the Government does not inform us as to how this right is to be exercised. We ask this Court to visualize how a defendant is to go about doing it. The prospective juror takes his place in the box; the attorney for the defendant asks him in what branch of the Government he is employed. He answers "I am employed in the Department of Justice." The Government in its present Brief would lead us to believe that upon this answer counsel for defendant could say, "I challenge you for cause." But a newly admitted Assistant United States Attorney would promptly respond, "There is nothing before this Court to show that the present juror could not give the defendant a fair trial. The mere fact that he is employed in the

Department of Justice does not, in the face of this statute, show that he is biased or prejudiced."(1) The Court would promptly sustain the Government and would require the defendant's counsel to ask the prospective juror if he felt that his employment in the Department of Justice would prevent his giving the defendant a fair trial. At this stage all of the arguments which led this Court in *Crawford v. United States*, to hold Government employees *per se* disqualified come into play. The juror's response that his employment in the Department of Justice would not prevent his giving the defendant a fair trial is entitled to no credibility. He is simply giving a surmise as to what he *thinks* his feelings are going to be in the course of a trial—a surmise not based upon a fact as in the case of a previous casual acquaintance with an attorney on either side of the case but a surmise based upon imponderables which may become strong or weak dependent upon the course of the trial, the evidence adduced, and all sorts of matters, of which the juror has no knowledge whatsoever at the time he makes his reply. Further, the Government's easy solution of this situation would have been an equally easy solution of this Court's problems in the *Crawford* case. This Court could readily have said that the *Crawford* juror was not shown to be biased or prejudiced by the mere fact that he was operating a postal substation. But it was significant that this Court did not wish to go into the complicated question of the juror's prognostications as to his future state of mind. It felt that the matter was too risky; that there was too much of a chance that the juror would be likely to be prejudiced; that there was too little assurance of his lack of susceptibility to

(1) See Reynolds v. U. S., 98 U. S. 145.

those human impulses, influences and motives which impinge upon every person however fair that person may desire to be.

One further word may be said with respect to the Government's argument (Brief, p. 17) that the present case illustrates the unlikelihood of bias on the part of a juror in Government employ and that any contention that Government employees feel a special interest in seeing the United States win the case "ignores the realities of the situation." The point is we don't know what the realities of the situation are. The realities of the situation are locked up in the minds and hearts of the prospective jurors. It is what they feel or may feel at the commencement of the trial or later which constitutes the realities of the situation. These feelings we have no way to explore short of the question "Do you think you can give the defendant a fair trial?", which settles at once everything and nothing. If such a question is to be asked of Government employees it can logically be asked of any person. Why not draw an Assistant United States Attorney and ask him the question? If the Government responds as it seems to in the present Brief that such a person's answer is not entitled to be considered, we say this constitutes a concession that the Governmental method of achieving a fair jury is ineffective. Or conversely, the Government must admit that there are certain relationships as to which bias or prejudice must be presumed. The Government's argument, therefore, is one based upon degree, but this degree is determined at haphazard. If the test question is good in one case it is good in all; there can never be any more certainty *in*

a particular case that a Government employee who says he can give the defendant a fair trial is more likely to give him a fair trial than an Assistant United States Attorney who makes the same response.

We think the Government concedes itself out of Court when it argues that under the present Statute a challenge for cause still exists with respect to a Government employee who is employed in the prosecuting branch of the Government. Laws tending to diminish constitutional guarantees concerned with human rights should deal with moral certainties, clear beyond misgiving. The present law is in no such classification. Government employees are not and cannot be beyond the imputation of interest on the side of the Government. If the so-called test question amounts to nothing and would if applied allow anyone and everyone to serve upon a jury provided that he answered that he could give the defendant a fair trial we think that only the doctrine of the *Crawford* case affords any protection to a defendant. Government employees must be eliminated as prospective jurors on the common sense theory of "safety first."

V.

The present legislation renders qualified as jurors in a criminal case persons who have always been disqualified even in civil damage suits.

The revolutionary character of the present statute will be appreciated when it is considered that it renders qualified and unchallengeable as jurors in a criminal case persons who have never been considered quali-

fied and who have always been considered challengeable for cause in civil cases of little importance. This too goes back to the common law for Blackstone states on this subject that in criminal cases challenges may be made "for the very same reasons that they may be made in civil causes" (4 Black. Com. 352).

The Supreme Court of the United States has already cited with approval Mr. Justice Shepard's dissenting opinion in *Crawford v. U. S.*, in this Court *(Crawford v. U. S.*, 30 App. D. C. 1, 32), wherein, after citing Blackstone (3 Black. Com. 363, *supra)*, Thompson and M. Juries, p. 176, he cites a long line of civil cases holding that the relationship of employer and employee worked an absolute disqualification.

In *Central Ry. Co. v. Mitchell*, 63 Ga. 173, 180, the Court stated:

> "It is almost impossible, however incorruptible one may be, not to bend before the weight of interest; and the power of the employer is that of him who clothes and feeds over him who is fed and clothed. Hence the *common law excluded all servants.*" (Italics ours.)

In *Temples v. Georgia Ry. Co.*, 82 S. E. 777, 779 (Ga.), the Court states, with reference to a relative sitting upon the jury that upon the general experience and observation of which the Court has knowledge, *as a matter of law* the juror is incompetent. The rule of law which excludes the juror is that once interest, direct or indirect, is shown the Court will take judicial knowledge of the fact that in all human probability a juror will act in accordance with his interest. The Court says:

> "When, according to universal human experience, the inherent probabilities of the circumstances by which the juror is environed and to the influence of which he is to be subjected compel the conclusion, in accord with the court's judicial knowledge, that the juror will *naturally be affected by his interest*, it cannot be held, as a matter of law, that the juror will contribute to or is qualified to sit in an *impartial trial* as guaranteed by the Constitution." (Griffith Record, p. 24. Italics ours.)

The Court points out that the disqualification of a relative of a party is based not upon the *actuality* of interest but upon the *probability* of its existence because as a matter of fact many men feel but little interest in their relatives, and in the same way many employees feel little interest in their employers. However, the Court says:

> "Always the highest test is self-interest, and where that appears it provides an *absolute* bar to qualification for service on the jury." (Italics ours.)

The desire for impartiality of jurors even in civil cases is so great that the rule is stated as follows:

> "In general the authorities hold that a very *insignificant* interest in the result of an action, and frequently a very *trifling relationship* to one of the parties, is sufficient to disqualify a person from sitting as a juror (16 Ruling Case Law, p. 273)." (Italics ours.)

In addition to the disqualifications referred to above the following have been held ground for disqualification of a juror or, as otherwise stated, a challenge for cause:

> Employee of a corporation in an action against it *(Hufnagle v. Delaware etc., Co.*, 76 Atl. 205 (Pa.), 40 L. R. A. N. S. 978, *O'Brien v. General Accident Co.*, 42 F. (2d) 50);

Attorney and client (*Jones v. Ford*, 134 N. W. 569 (Ia.), 38 L. R. A. N. S. 777);

Master and servant (*Co. Litt.*, 1576; *3 Black. Com.*, 363; *Tidd's Prac.* (4th Amer. Ed. 853));

Servants of lessee who are also servants of lessor (*Georgia Ry. Co. v. Tice*, 50 S. E. 916 (Ga.));

Landlord and tenant, at common law (*5 Bacon's Abridgement*, 352; *Co. Litt.*, 158 A. 157 B);

Stockholder (*Stone v. Monticello Construction Co.*, 40 L. R. A. N. S. 978, note);

Relatives of stockholders in a corporation (*Walter v. Louisville Ry. Co.*, 150 S. W. 824 (Ky.) 42 L. R. A. N. S. 126);

Cases of contractual relationship (*Quay v. Duluth Ry. Co.*, 116 N. W. 1001, 18 L. R. A. N. S. 250);

One interested in an indemnity company which would have to pay the judgment (*See note L. R. A.* 1915 A, 154 *et seq.*).

As in the civil cases above enumerated prospective jurors in the particular classes are disqualified and may be challenged for cause on the revelation of their status without further enquiry it would seem that the rule should be still more strict in respect of jurors in criminal cases. It is interesting to note that in most, if not all, the cases above given the reason for the rule is not that the juror is in fact prejudiced, but the likelihood that in some contingency of the case he might become prejudiced. The fact that the juror might say on oath that he would not be prejudiced is taken of as

little account, the Court rightly concluding that his testimony on this point being more or less of a prediction is not entitled to be deemed conclusive, and hence in fairness to the other side the interested juror must be excluded.

VI.

The Government's Argument that Aside From The Common Law the Act Does Not Impair the Essential Element of Trial by an Impartial Jury. (Government's Brief, pp. 59-74.)

On this point, the Government argues that this Court intimated in the *Crawford* case that the common law rule could be modified by statute in the various States. This is perfectly true, so far as the Federal Government is concerned. The States can make anything they want Due Process in criminal cases, within obvious limitations. *(Ashe v. U. S.*, 270 U. S. 424.) The States, therefore, can alter the common law qualifications of jurors, assuming their own Constitutions do not forbid it, or could abolish trial by jury entirely if they wanted to. *(Snyder v. Masse*, 291 U. S. 97.) It is well known that the first six Amendments to the Constitution are limitations only upon the Federal Government, not upon the States. But so far as the United States is concerned, we do not think *Crawford v. U. S., supra*, is authority that the Federal Government can abolish the common law qualifications for jurors in respect of interest flowing from the relationship of master and servant. The question was not before the Court, and the Opinion contains no discussion of the question.

Walker v. New Mexico and Southern Pacific R. Co., 165 U. S. 593, 596, to the effect that the aim of the

Seventh Amendment "is not to preserve mere matters of form and procedure but substance of right" is in line with respondent's argument herein, which is devoted entirely to the contention that the present Statute is a substantial diminution of the Constitutional guarantee of an impartial jury. The present Statute in no way involves any matters of form. Nor do we differ with the statements quoted by the Government from *Ex parte Peterson,* 253 U. S. 300, 309, 310, that the Seventh Amendment does not prohibit changes in the jury system. It is not that the present Statute has "changed" trial by jury, but has changed it for the worse; this is respondent's argument. The Government's further argument that various changes in the jury system, such as the reduction of peremptory challenges; the change of the common law privilege with respect to the number of challenges where there are joint defendants; the fact that a juror who has formed an opinion may still act under certain conditions; that women may serve as jurors; that the examination on the *voir dire* may now be conducted by the Judge, and finally, that the common law jury *de medietate linguae* has been abolished, is not persuasive in the present case. The changes above referred to do not involve the essential feature of the jury system, which is impartiality. None of these changes tend to make it *less likely* that an impartial jury will be obtained. As to the cases in the various States holding that State employees are not disqualified from acting as jurors it is noticeable that many of them were decided subsequent to this Court's decision in the *Crawford* case in 1908. This being so they simply represent a difference of opinion between the Legislatures and the Courts of the States and this Court. It is hardly an argument that

this Court is wrong simply because State Courts disagree with it; the point is the *reasons* back of the disagreement. On this question we are content with this Court's reasoning in the *Crawford* case.

We think also that to be reasonable, any statute changing the common law with reference to the disqualification of one in the relationship of master and servant should work both ways. In other words, if a Statute destroys a defendant's right to challenge a servant of the Government, as the present Statute does, the Government's right to challenge a servant of the defendant should likewise be destroyed. This, however, is not the fact. The present Statute removes the one but preserves the other, and thus possibly is in violation not only of the Sixth Amendment but of the Fifth as constituting an unreasonable discrimination or classification.

We make one final suggestion. In "The Business of the Supreme Court" by Professors Frankfurter and Landis[1] the authors advert to this Court's approval in *Muller v. Oregon*, 208 U. S. 412, 419-421, of the method of inquiring into the reasonableness of legislation by considering the facts upon which such legislation is based,[2] a method seemingly adopted by the Government in its present Brief in dealing with "The Factual Background" of the Act herein, (Gov. Brief, pp. 9-19). The authors go on to say:

> "One thing is clear. The legal profession has not yet put its mind to devising the necessary method and machinery by which knowledge of

(1). P. 313-314.
(2). Followed in Bunting v. Oregon, 243 U. S. 426; Stettler v. O'Hara, 243 U. S. 629; Adkins v. Children's Hospital, 261 U. S. 525. Compare also People v. Schweinler Press, 214 N. Y. 395.

those facts, which are the foundation of constitutional judgment, may be formally put at the service of courts." (Frankfurter & Landis, "The Business of the Supreme Court", p. 315.)

We make our own contribution to the solution of this problem, which is to appeal, on a question of the Constitutionality of legislation altering legal procedure, to the experience of the members of this Court. Every one of the nine Justices on this Court has probably at one time or other in his professional career represented a defendant in a criminal case or a plaintiff in a civil suit at law against the Government or the State. We ask each member of this Court, searching his memory and considering his past experience, to say frankly whether in such a case and with such a client he would not, with three peremptory challenges left, automatically challenge every Government employee remaining on the jury. If so, we say the deep-rooted misgiving so evidenced proves the point we have perhaps gropingly attempted to set forth: that no one will ever be satisfied as to the complete fairness of a jury of his adversary's employees. In this situation it is reasonable to foresee an interference with the exercise of the right of peremptory challenges, which if the present Statute be held constitutional, will from now on be diverted from their traditional use[1] and devoted exclusively to the paramount problem of how to keep Government employees off the jury. We suggest this appeal goes far to answer the problem of the present case.

(1). I. e., a "free" challenge, not necessarily based upon a definite reason; see 4 Black. Com. 353; also U. S. v. Marchant, 4 Mason, 160, 162; Lewis v. U. S., 146 U. S. 370.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

ROBERT I. MILLER,
503 D Street, N. W.,

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
Investment Building,
Washington, D. C.,
Attorneys for Respondent.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 30 1936
CHARLES ELMORE CROPLEY
CLERK

No. 34.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

RAYMOND WOOD.

MOTION OF CHARLES J. HOEPPEL AND JOHN H. HOEPPEL FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICI CURIAE.

JAMES J. LAUGHLIN,
1363 Parkwood Place,
Washington, D. C.,
Counsel for Charles J. Hoeppel and John H. Hoeppel as Amici Curiae.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 34.

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

RAYMOND WOOD.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

May it Please the Court:

The undersigned, as counsel for Charles J. Hoeppel and John H. Hoeppel, move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae*.

JAMES J. LAUGHLIN,
Counsel for Charles J. Hoeppel and John H. Hoeppel as Amici Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 34.

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

RAYMOND WOOD.

BRIEF OF CHARLES J. HOEPPEL AND JOHN H. HOEPPEL AS AMICI CURIAE.

I.

PRELIMINARY STATEMENT.

The case of Raymond Wood, an obscure negro, is far more important and involves issues of even greater magnitude than that of another obscure negro, Dred Scott, as to which the Court is referred to its records and to history. These issues affect the right of every man, whether white, black, red, yellow or brown, to an *impartial* trial.

The particular interest which has caused the application for leave to file this brief *amicus curiae* arises from the fact that in petition for certiorari, No. 141, the same issues are raised by the appellants therein, Charles J. Hoeppel and John H. Hoeppel. While this petition was denied without

opinion on October 12, 1936, by this Court, a petition for rehearing is now in course of preparation and will be filed within the time allowed by the rules. A decision on the substantial constitutional issues in the *Wood* case would necessarily affect the same issues raised in the *Hoeppel* case.

Furthermore, in asking leave to file this brief, the movers are representative of a large class of persons who will be directly affected by a decision in the present case. According to the Washington (D. C.) "News", of March 25, 1936, page 1, Column 2, 768 indictments have been returned by grand juries containing Government employees since the Act of August 22, 1935, c. 605, 49 Stat. 682, went into effect. This does not include the large number of jury trials of those indicted before this Act became effective but tried by unconstitutional juries selected thereunder. Even though it may be too late to raise these issues on certiorari—and it is believed that this Court will await its final action on petition for rehearing in the Hoeppel case before pre-judging this question—it is entirely proper to raise such issues in *habeas corpus* proceedings, especially, as the Solicitor General denied that "there has been any *showing* that the petitioners (in the *Hoeppel* case) were tried by a jury which was in fact biased or prejudiced against them." (P. 6, U. S. brief) Of course, the court below, in the *Wood* case, and this Court in the *Crawford* case, held such a showing unnecessary.

The present Chief Justice of this Court has suggested weighty reasons why these issues not only affect the individuals in this nation but the nation itself and its form of government, saying:

> "With the common law, we took its distinctive feature of TRIAL BY JURY, at once a BULWARK OF FREEDOM and an effective method of applying to infinitely varied states of fact within ordinary experience the common sense of the community. But in ob-

taining the practical advantages of this method we have found what is, especially for us, a most important by-product, the advantage of which in the MAINTENANCE OF FREE INSTITUTIONS is rarely mentioned. I refer to its advantage as a means of instruction. Throughout our land, in the more than 2,500 counties in our states, our citizens are constantly sitting in grand juries and petty juries, in criminal cases, and as trial juries in civil cases, so that the qualified portion—which is very large—of our population is constantly passing in rotation through our courts receiving directions, obtaining schooling in our laws and acting as RESPONSIBLE CRITICS and valuers of assertion, testimony and argument—A PRICELESS DISCIPLINE IN DEMOCRACY.—"Pathways to Peace", page 210.

Independent of Article III and Amendment VI, the due process of law clauses of the Constitution protect trial by an IMPARTIAL jury. Mr. Justice Cardoza has stated that one of those "indispensable elements of justice" which is "essential to the attainment of due process of law" is that "there must be TRIAL BY AN *IMPARTIAL* JUDGE WITHOUT INTEREST IN THE EVENT." ("The Paradoxes of Legal Science", page 2) It is obvious that this statement applies equally whether it is a judge of fact (a juror) or a judge of law.

Reference has been made to the authorities holding that neither lack of diligence nor a waiver of the right of an *impartial* jury trial is of any importance on this fundamental question. It is only sufficient to say at this time that NO DECISION OF THIS COURT HAS EVER HELD THAT THE RIGHT TO AN *IMPARTIAL* JURY TRIAL CAN BE WAIVED.

At the least, the issues are important to the Hoeppels and those similarly situated in view of their right to apply for habeas corpus and their constitutional right to petition the President of the United States for a pardon on the ground that they were tried by a partial jury of Federal partisans in violation of their constitutional rights.

II.

ARGUMENT.

The Government brief presents precedents from the blackest days of the darkest period of the common law in an attempt to justify packing Federal juries with Federal partisans. It is sufficient to dispose of unhappy precedents from "Bloody Judge Jeffreys" and the persecution of Rowan, the Irish patriot, and others, by quoting the historian, Macauley:

> "The King was forced to remove those who thwarted him by means of perjured witnesses, PACKED JURIES and corrupt, hard-hearted, brow-beating judges. . . . The tribunals were an unclean public shambles, to which each party in its turn, dragged its opponents and where each found the same venal and ferocious butchers waiting for its custom. Papist or Protestant, Tory or Whig, Priest or Alderman, all was one to those greedy and savage natures, providing only there was money to earn or blood to shed. Of course, these worthless judges soon created around them, as was natural, a breed of informers, more wicked, if possible, than themselves." (Macauley's Works, Vol. .., page .....)

Professor Laski recalls a precedent of this period, which the Government does not cite, that "During the Irish land troubles of the last century, the empanelled special juries were almost invariably Protestant (supporters of the Government) as the prisoners were almost equally invariably Roman Catholics. One Delany, a juror, protested against the deliberate exclusion of Roman Catholics from the panel of special jurors and WAS AT ONCE FINED FOR CONTEMPT OF COURT." ("Studies in Law and Politics", page 3) It seems that the Government should therefore cite counsel for contempt for protesting against packing of their juries with partisans and employees of the Government.

Just before his death, Judge Crane, of the New York Court of Appeals, well said: "THE JURY IS THE LAST VESTIGE OF PURE DEMOCRACY THAT REMAINS."

While a member of the same court, Mr. Justice Cardoza intimated that even Government employees, pensioners, contractors, and others, might have at least an unconscious bias in favor of the Government from which they receive their livelihood, saying: "Deep below consciousness are . . . the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge. . . . The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by." ("The Nature of the Judicial Process", pp. 167-8)

This Court has held that the "constitution should be read in the light of its history and of the understanding of the whole American people when the grant was made," (*Gibbons* v. *Ogden,* 9 Wheat. 1) and not in the dim light of the darkest shadows of the common law.

The first and only definition of the right to jury trial in American history was that of the first Continental Congress, October 26, 1774, in an address to the "inhabitants of Quebec," which specified that jurors must be "unexceptionable" (*i. e.,* impartial). The Declaration of Independence charged King George III with "Depriving us in many cases of the BENEFITS of trial by jury."

This Court well said in *Ex. p. Milligan,* 4 Wall. 123: ". . . that when the original Constitution was proposed for adoption it encountered severe opposition and but for the belief that it would be so amended as to embrace them (trial by jury and trial in vicinage) it (the Constitution) would never have been adopted." That is why Article III, providing for trial by jury in criminal cases, was changed by Amendment VI to require trial by an "IMPARTIAL jury."

The "opposition" referred to by this Court in the Milligan case has been preserved in many cases by the constitutional debates. Patrick Henry pointed out the danger of permitting trial of citizens of the states in the District of Columbia, the "ten miles square", claiming trials would be dominated by partisans of the Federal government and of the Administration, and while the reporter did not get his complete remarks, John Marshall preserved part indirectly by his reply before the Virginia constitutional convention:

> "I hope that in this country, where IMPARTIALITY is so much admired, the laws will direct facts to be ascertained by a jury. But, says the honorable gentleman (Patrick Henry), THE JURIES IN THE TEN MILES SQUARE WILL BE MERE TOOLS OF PARTIES . . . Because the government may have a district ten miles square, will no man stay there but the tools and officers of the government? . . . Will there not be independent merchants, and respectable gentlemen of fortune, within the ten miles square? Will there not be worthy farmers and mechanics?"

Washington has since grown from a few hundred population to 600,000, yet, after 148 years, we find the dissenting judge in the *Wood* case and the Solicitor General of the United States actually proposing to allow 100,000 government employes and other government partisans to sit in cases in which the government is a party. Furthermore, nearly all of the 100,000, due to the classified civil service apportioning these positions among residents of the states, and politicians seeing to it that the others are nearly all residents and voters of their states, *are not even legal residents of this jurisdiction in which they temporarily sojourn,* and could not serve as jurors.

THE REAL ISSUE IS WHETHER THE FEDERAL GOVERNMENT CAN PACK JURIES WITH FEDERAL PARTISANS IN CASES IN WHICH IT IS A PARTY.

The Court of Appeals, in its decision in the *Wood* case, recognized and gave effect to the Sixth Amendment to the Constitution, which provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury." The Opinion quotes the language of the statute which is held to be unconstitutional and reviews, at length, both common law and Federal decisions, and then lays down the correct rule with respect to requiring impartial jurors, saying:

> "Indeed, the rule is that a very small or insignificant interest in the result of the trial is sufficient to disqualify a person from sitting as a juror. In short, wherever there appears to be any self-interest, that fact provides an absolute disqualification. The rule but recognizes the unalterable fact that our human nature inevitably looks with favor upon the side that supplies the means of existence. And it would seem, in fairness, that the rule should and ought to apply equally to an employee of the United States. But we have no need to rely upon our own views, or to set them forth at any length, for the Supreme Court in the *Crawford* case has foreclosed all doubt on that subject."

The Court quotes from Crawford v. United States, 212 U. S. 183, holding Federal employees cannot sit on juries where their employer, the United States, is a party:

> "A jury composed of government employees where the government was a party to the case on trial would not in the least conduce to respect for, or belief in, the fairness of the system of trial by jury. To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such *relation to* either side as to lead on that account to any doubt on that subject."

The relation of Crawford, a druggist, to the United States in that case was in the joint nature of employee and contractor, as he received $300 a year to serve as postal clerk and for rent of a postal sub-station in his drug store.

Contractural relationship also disqualifies as is shown in *Quay* v. *Duluth Ry. Co.*, 116 N. W. 1001, 18 L. R. A. N. S. 250.

There is no difference in principle between the constitutional requirement of an impartial jury and the constitutional requirement of an impartial judge being necessary as due process of law. The Court has upheld the necessity of judges being impartial in a number of cases.

Berger v. United States, 255 U. S. 22, 36;
Tumey v. Ohio, 273 U. S. 510;
Cf. 2 Cooley, Constitutional Limitations, 8th ed. 870, 873, 874;
Quercia v. United States, 289 U. S. 469.

Cooley, supra, illustrates the main questions involved because he points out that (1) Coke doubted whether even Parliament could make a man judge (or juror) in his own cause even under the unlimited power of that body, and (2) that no state or Federal legislative body can do so, and (3) no person can waive a trial by an impartial judge or jury and submit to a trial by interested or disqualified persons, saying:

> "There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for JURA NATURAE SUNT IMMUTABILIA, and they are LEGES LEGUM.'
>
> * * * * * *

"* * * To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.

"Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in an appellate court; and the suit may there be dismissed on that ground. The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction. And if one of the judges constituting a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party."

A constitutional jury must be IMPARTIAL and, if it is composed of one or more disqualified and partial jurors, it is not a constitutional tribunal. If it is not a constitutional tribunal, it does not have jurisdiction and its judgment is void. It is never too late to raise a question of Federal jurisdiction in any Federal court.

The Court said in *Mitchell* v. *Maurer*, 293 U. S. 237, 244:

"Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself, not only of its own jurisdiction, but also of that of the lower courts in a cause under review. Mansfield, etc. Ry. v. Swan, 111 U. S. 379, 382."

The Court sustained this point in *Thompson* v. *Utah*, 170 U. S. 343, 353, where it said:

"It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that this trial by such a jury was in violation of his constitutional rights. It is sufficient to say that IT WAS NOT IN

> THE POWER OF ONE ACCUSED OF FELONY, *BY CONSENT EXPRESSLY GIVEN* OR *BY HIS SILENCE*, TO AUTHORIZE A JURY OF ONLY EIGHT PERSONS TO PASS UPON THE QUESTION OF HIS GUILT. The law in force, when this crime was committed, did not permit any TRIBUNAL to deprive him of his liberty, except one constituted of a court and a jury of twelve persons."

The Fourth Circuit Court of Appeals, in *Coates* v. *United States*, 290 Fed. 135, itself raised this point although not assigned as error, on the authority of the foregoing case and *Callan* v. *Wilson*, 127 U. S. 540, saying:

> "It is true that he *EXPRESSLY* CONSENTED TO WAIVE A JURY TRIAL and does not now seek a relief from his agreement; nevertheless, THE CONSTITUTIONAL REQUIREMENT IS MANDATORY: IT CAN NOT BE WAIVED IN ANY CASE TO WHICH IT IS APPLICABLE."

To the same effect is *Low* v. *United States*, 169 Fed. 86 (opinion by *Lurton, J.*, afterwards on this Court) where it is stated:

> "He may not waive that which concerns both himself and the public, nor any matter which involves fundamentally the jurisdiction of the court." *Dickinson* v. *United States*, 159 Fed. 801.

The Court, Justices Sutherland, Van Devanter, McReynolds and Butler, with Justice Sanford, agreeing to the disposition, held in *Patton* v. *United States*, 281 U. S. 276 (1930) that under five specified conditions a defendant could waive a jury trial so as to be tried by the judge alone and by the same conditions waive a constitutional jury of twelve and submit to a trial by less than twelve jurors. Justice Holmes, Brandeis, and Stone only concurred in "the result." The question came up in a case where the defendant

had expressly waived twelve jurors when one became sick, and agreed for the trial to continue before eleven jurors.

THE *PATTON* CASE DID NOT HOLD THAT A JURY OF *DISQUALIFIED* AND *PARTIAL* JURORS COULD BE WAIVED, AND VALID CONSENT TO TRIAL THEREBY BE GIVEN. It correctly holds that the Sixth Amendment protects not the mere form of jury trial but "any of the *essential* elements thereof." The main essential element is that it must be "impartial." This court has never held that any citizen can waive under any circumstances, however specific, the constitutional requirement of an "impartial" jury. The law requires the judge to be impartial and it must be an impartial jury, even if less than twelve in number.

The only case in which this Court ever held that any essential element of a constitutional jury trial could be waived is the 1930 case of *Patton* v. *United States,* supra.

Unless the case comes within the conditions of waiver set out in that case, no waiver can be held to exist. While we believe that no waiver of "impartiality" can ever be upheld by a Federal Court, it is sufficient in this case to prove that there was no compliance with any one of the five specified conditions set out in the *Patton* case as absolutely necessary in order that a valid waiver of an essential element of constitutional jury trial may be proven.

The first condition is the "consent of government counsel" to the waiver and the "sanction of the court" is the next. Neither was given nor asked, as the matter was not mentioned at the voir dire examination. The third condition is that the "express" consent of the defendants be given, which cannot be shown because the question was not raised. The same is true of the fourth requirement of an "intelligent consent" of the defendants. They could not expressly and intelligently consent to something about which they knew nothing. It is plain that the Court considers a waiver of any element of a constitutional jury

trial to be too important to be implied from conduct or silence. The fifth requirement to a valid waiver is that the judge must perform his duty before giving his sanction to a waiver of a constitutional jury not "as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from *any of the essential elements thereof.*"

Where the right to a constitutional trial by jury is involved, a Federal appellate court will raise the question of its own motion, as illustrated by *Coates* v. *United States, supra,* and *Thompson* v. *Utah, supra.* However, the power to notice plain error in a federal appeal is settled, *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, 480, and the appellate federal courts are required to do so under *Judicial Code, Sec. 269* (U. S. C. A., T. 28, Sec. 391).

In the *Wood* case, supra, the Court of Appeals said the disqualified jurors "represented nearly half the panel. In other cases, they might well represent the whole. It is not enough to say that they might discharge their duties fairly to the accused." The Court of Appeals thus had judicial notice from its own records that this class of disqualified jurors were serving at the time of petitioners' trial. Furthermore, there was a presumption, made overwhelming by judicial notice and common knowledge, that said statute allowing disqualified jurors to serve on juries was being enforced during the time of petitioners' trial. This court has indulged presumptions when necessary to protect the constitutional right to jury trial in cases such as *Neal* v. *Delaware,* 103 U. S. 370, 397, and *Norris* v. *Alabama,* 294 U. S. 587, 599.

CONCLUSION.

The Government's argument about Government employees being "Crown servants" is based on the old construction of the maxim, "The King (and his servants) can do

no wrong." The modern common law in England as to this maxim has been well stated by the present Lord Chief Justice of England, Lord Hewart of Bury, in his book, "The New Despotism", which has made a profound impression in England and America, at page 23: "The Maxim 'The King can do no wrong' imports not only that the King cannot be proceeded against for any alleged wrong, but also that HE CANNOT AUTHORIZE ANY WRONGFUL ACT so as to justify the wrongdoer.' " The same jurist, while speaking mainly of administrative decisions, says, at page 46:

> "The public official is not independent. As a civil servant, he is liable to be dismissed at any time without notice, and without any enforceable right to compensation. One would have thought it perfectly obvious that no one employed in an administrative capacity ought to be entrusted with judicial duties in matters connected with his administrative duties. THE RESPECTIVE DUTIES ARE INCOMPATIBLE. IT IS TOO MUCH TO EXPECT IN SUCH CIRCUMSTANCES THAT HE SHOULD PERFORM THE JUDICIAL DUTIES IMPARTIALLY. Even if he acts in good faith, and does his best to come to a right decision, he cannot help bringing what may be called an official or departmental mind, which is a very different thing from a judicial mind, as everybody who has had any dealings with public officials knows, to bear on the matter he has to decide. More than that, it is his duty, as an official, to obey any instructions given him by his superiors, and, in the absence of special instructions, TO FURTHER WHAT HE KNOWS TO BE THE POLICY OF HIS DEPARTMENT. HIS POSITION MAKES IT INEVITABLE THAT HE SHOULD BE SUBJECT TO POLITICAL INFLUENCES."

In conclusion, counsel *amici curiae* respectfully submit that the decision in the *Wood* case below should be sustained in even stronger language and reasoning than that in the opinion below and that its decision be applied to all cases,

including the *Hoeppel* case, at this term of court and hereafter.

JAMES J. LAUGHLIN,
1363 Parkwood Place,
Washington, D. C.,
Counsel for Charles J. Hoeppel and John H. Hoeppel as Amici Curiae.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 34

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

RAYMOND WOOD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PETITION FOR REHEARING.

The present petition for rehearing of this Court's decision, entered December 7, 1936, is respectfully presented for the following reasons:

This Court in the first paragraph of its opinion (p. 3) states that neither the present case nor the present Statute involves any question of actual bias. Later in the opinion this Court states that the present law "permits full inquiry as to actual bias" in the exceptional cases wherein a juror might have a special interest, as, for instance, where in a trial for counterfeiting he was an employee of the Treasury Department (Op., p. 15). We infer, therefore, that this Court has arrived at the decision herein, at least in

part, upon the theory that in any prosecution involving the particular Department or Division wherein a particular juror is employed, it would be competent for counsel for the defendant to challenge the juror for cause on the basis of his employment in the particular Division, or that the trial judge, of his own motion, could exclude the particular juror in such a case.

We respectfully invite the attention of the Court to the fact that the Statute itself prevents any such challenge for cause. It states:

> "All other persons, otherwise qualified according to law * * * shall be qualified to serve as jurors in the District of Columbia *and shall not be exempt from such service.*"

The Statute is all-inclusive: there is no exception in favor of Government employees employed in the particular Department or Division wherein the crime may have occurred. Nor is the phrase "otherwise qualified according to law"[1]

---

[1] The phrase obviously refers to the technical qualifications of jurors set forth in Title 18, Section 357 of the D. C. Code, 1929; Section 215, D. C. Code, 1901, reading as follows:

> "357. Qualifications of jurors.—No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, able to read and write and to understand the English language, and a good and lawful person, who has never been convicted of a felony or a misdemeanor involving moral turpitude. (Mar. 3, 1901, 31 Stat. 1223, c. 854, sec. 215)".

The proof that a person employed in the particular Department or Bureau could not be excused on the ground that he was not "otherwise qualified according to law" is the fact that the latter phrase anti-dates in point of time the selection of the names of jurors by the Jury Commission under Section 347, D. C. Code, 1929. The Jury Commission obviously has nothing whatever to do with the ascertainment of actual bias. The phrase, therefore, "otherwise qualified according to law" is a mandate addressed to the Jury Commission not to the trial Court and seems to have no application whatever to the form of "actual bias" seemingly recognized by this Court in the case of employment in the particular Department or Bureau involved.

of assistance in enabling a court to read into the Statute a disqualification for so-called *actual* bias where the employee is employed in the particular Bureau near the seat of the crime. The mere *fact* of such employment no more raises the presumption of actual bias than in the present case. In a case of this character no judge would permit a challenge for cause on the basis of the mere *fact* of employment in the particular Bureau. He would be compelled to inquire further and ask the juror whether in view of his employment in that particular Bureau he still felt that he could give the defendant a fair trial. If he answered "Yes", this would end the matter, and the judge could not consistently and under the law excuse him. Yet according to this Court seemingly the juror should be excused. Of course, the judge might, throwing law to the winds, excuse the juror in question, but we are not dealing here with matters of grace but matters of legal right. Present counsel participated in a conspiracy trial not long ago wherein two employees of the Income Tax unit were charged with conspiring with an outside auditor. A juror employed in the Income Tax unit of the Bureau of Internal Revenue was called and challenged for cause on that basis, a challenge which this Court seemingly has indicated in its opinion should be allowed. The court promptly overruled the challenge stating that the mere fact of the juror's employment did not show any actual bias. Later when all peremptory challenges had been exhausted (principally in removing from the jury other Government employees) the trial judge called counsel to the bench and made the following statement in substance:

> As to juror number 12, employed in the Income Tax unit of the Bureau of Internal Revenue, your challenge for cause, is, of course, no good. However, I think it would be fairer if I did not allow him to sit and accordingly I will excuse him.

And the judge excused him. But this, of course, is not government by law, it is government by the toe of the Chancellor. It was a pure act of grace on the part of the judge and in fact amounted to a disregard of an Act of Congress.

Defendants in criminal cases ought not to be compelled to depend upon a trial judge's disregard of the plain mandate of a Federal Statute for the safeguards of an "impartial" jury within the meaning of the Sixth Amendment. We go further and say we ought not to have to depend upon any act of grace on the part of the trial judge or any "discretion" whatsoever in achieving the safeguards of our essential liberties.

As to the question to be asked the employee of the particular Department, "In spite of this could you give the defendant a fair trial?" it is obvious that, as pointed out in respondent's main brief herein, the juror's response answers at once everything and nothing. First of all the question invites the answer "Yes, I can give him a fair trial" as all jurors are quick to rebut the suggestion that they could possibly be unfair. In addition, all the arguments stressed by this Court in *Crawford* v. *United States*, 212 U. S. 183, as to bias being an elusive condition of the mind flowing from interest, and interest flowing from employment, come into play. Seemingly in the opinion of this Court these arguments are still applicable to a case wherein the employee works in the particular department having a primary interest in the case, such as in the instance given in the opinion, a case of counterfeiting involving the Treasury Department.

Any practice introduced to permit a trial judge to protect the interests of the accused as he alone determines and in his discretion sees fit, produces not only confusion in the mind of the defendant but positive disadvantage to his serious detriment in obtaining an impartial jury in accord with his constitutional rights. Assume a practical example,

common in our District Court below. This Court, in its opinion (p. 15), says of a case in which a Government employee might have a special interest, "But when we consider the range of offenses and the general run of criminal prosecutions, it is apparent that such cases of special interest would be exceptional." There is nothing in the record to warrant this assumption. The fact is nearly every case of major importance tried in our District Court is one which "*might be of special interest to employees in certain Government departments.*" (Italics ours.) (P. 15, Opinion, this Court.) Such cases are not exceptional. They are not uncommon. Every term of the criminal court has one, several or many upon its docket. They create a very marked public interest. Newspaper comment and report attract wide attention and pronounced divergent views in jurors possible to be drawn later to determine the merits of the accusation, the guilt or innocence of the accused. Postulate the protection of the defendant in his right to challenge for cause one drawn for the jury whose opinion is so fixed it would require evidence to remove it, the fact still remains as a practical, not theoretical or imaginary experience, in such cases the majority of the panel called respond in the affirmative to the question whether they have read or heard of the case and are usually accepted upon their assurance they have no opinion and can give the defendant a fair and impartial trial, only, no doubt, to have their then latent recollections and their subconscious bias, perhaps, awakened and refreshed when the testimony for the prosecution, of which they are not informed upon the *voir dire,* explained in the opening statement for the Government or elicited in the trial. Every defendant in such a case is put to most serious concern, but modern conditions have stamped the law into the mold of their demands. The accused must face them as best he can. Add to this the very dangerous precedent of permitting Government employees

to be drawn and qualified to sit as jurors in such a case. No longer is it one in which the United States acts as a mere formal prosecutor, the sovereign representative of the people of the District of Columbia, proceeding against the accused in the interests of public order and the preservation of the public peace, private property, life, and good government. That cloak has fallen from its shoulders. The mantle has been cast aside. The prosecutor is no longer a formal, sovereignty representative merely. The United States has an actual, deep, serious, determined self interest in the case now. It has been attacked directly by the accused with respect to its orderly functions of government; its property has been stolen or injured; its direct mandates have been broken, flaunted; in all its sovereign dignity it approaches one of its own tribunals and as a direct, injured, demanding suitor calls upon the Court, at its own instigation, to punish the accused. Government can function only through its officers, its employees. Their living and that of their family, their ambitions to promotion, advancement, higher compensation, their very happiness in life depend on the preservation of their Government and the continuance of their employment in a way peculiar and entirely distinct from the ordinary prospective juror whose existence is not so directly related to the Government and its operations. Is their interest in such a prosecution "remote," "minute," "chimerical," or is it definite, certain, present—at least if the evidence, of which they are ignorant when sworn, developes a situation in which their own department or even they or he so sworn, may be put under suspicion, or under regulations to be passed thwarting and hampering the chances either of retention of present position or advancement to a better. These are not fanciful assumptions. They are not imaginary hypotheses put forward with no experience to assure their expression or actuality to affirm

their true existence. Any trial lawyer, called to the defense of an accused in such a case must be shocked to find facing him or his clients as judges of the facts jurors directly interested in the very department or sovereign in and by which they are employed. If one can sit, so may twelve and the guarantee of an impartial jury becomes a spectacle of the prosecutor's own selected panel judging one accused of violating the prosecutor who can hire, fire, degrade not only them but through them their families as well. Such a spectacle ought not to be permitted under our system of government with its constitutional protections enacted deliberately to prevent the very existence of just such a spectacle. To revert to the dark days of the Year Books and Commentators who recorded and commented upon the rights of an accused in the period of the growth of our criminal law is but to relegate the defendant to a theory of the criminal law incompatible with our notion of justice, to strip him of the shield and armor given him by our constitution and send him to an unwarranted conviction, perhaps, while outwardly still retaining the form of those constitutional guarantees. The fact is we would be but enforcing the philosophy of centuries ago, foreign to every concept of an impartial jury. Of the reasons underlying the cases cited in the Year Books and by the Commentators, *cessante ratione cessat ipsa lex* is applicable. Blackstone should be followed, it is submitted. The Colonists knew his work. Burke in his great speech on America noticed the fact that more copies of *Blackstone's Commentaries* were sold in the American Colonies than in England itself. His pronouncement is in direct accord with respondent's contention and the opinion of this Court in the *Crawford* case. It is in accord with a fair interpretation of an impartial jury when analyzed in connection with an Act of Congress which is so broad in its terms as to permit a Government employee to

sit on a jury in a case wherein the United States is the party prosecuting and directly and intensely interested to see that its sovereignty and its laws remain inviolate.

To revert—Is the protection still afforded under the Act in question by inquiry on the *voir dire* of the juror's actual bias and the Court's power in its discretion to secure an impartial jury by excusing for no reason a Government employee in any of the many cases presented wherein the United States is actually the interested prosecutor, sufficient to protect the defendant on his trial? Assume the practical, not the theoretical. Under this Court's opinion, the trial judge may or may not excuse the employee. No law compels him thus to excuse. His discretion may vary in its judgment from that of another judge. The danger of it all is the judge may have no sufficient grounds presented upon which he may exercise his discretion rationally. He will attempt to protect the rights of the accused undoubtedly. His oath requires him to do so. But the facts may fit neither his desire nor his oath—and they probably will not, due to no fault imputable either to the Court or the prospective juror. Assume the trial of a case in which the United States is directly interested about to begin. The tentative panel is in the box. On it six Government employees have been called, several "in the very department to the affairs of which the alleged" offense related. Under the opinion of this Court no principal challenge lies for the defendant and the Court must deny one if interposed. Asked if each has any actual bias, each replies in the negative—and honestly. None knows what the prosecution will present in proof of the accusation. Each honestly believes he could give the accused a fair and impartial trial. Defendant's counsel in genuine concern over this spectacle of employees called to sit on the jury exercises his right of peremptory challenge to each and to his dismay the Court calls additional employees until he is driven to exhaust his

peremptory challenges in excluding them from the jury. While his challenges are given to reject not to select, counsel is now shorn of further protection for his client except his challenge to the juror which he finds no ground to exercise. In this situation the Court is called upon to exercise its discretion. Assume five Government employees have been selected. Each has answered he can give the defendant a fair and impartial trial—and not one knows whether he can or cannot. He has not heard and does not know the evidence. It may disclose facts on the prosecution so detrimental to the accused with respect to his conduct in relation to the affairs of the department in which the jurors—or some of them are employed—that a bias of which none thought he possessed immediately arises preventing a fair and impartial acceptance or analysis of the accused's evidence offered in his own defense. A reality establishing the inherent danger of permitting our jury system thus to be endangered with respect to its impartiality. But the Court is likewise ignorant of the evidence. It has only the answers of the prospective jurors before it that each can give the defendant that fair trial which none can certainly be able to afford. In this situation the Court has little to justify the exercise of discretion. He may or may not excuse one or all of the employees. If he does not, the defendant then is in jeopardy indeed. If he does, the defendant is disadvantaged, in another particular. He no longer possesses principal challenges. They have been exhausted in rejecting former employees drawn tentatively for service. He must now accept any juror called to replace those excused. His challenges "to the juror" alone protects him. Obviously, therefore, under any theory of practice to be followed in accordance with the opinion of this Court, the defendant is confounded in his effort to obtain an impartial jury and disadvantaged in the actual, practical conduct of his defense.

It is apparent more is involved in this issue than "readjustments of procedure consistent with the spirit and purpose" (opinion, p. 12) of the administration of criminal law; that the interest which it may be possible for a juror to possess and still be qualified to sit in any and every case in which the United States is a party directly interested is entirely distinct "from an interest which is only theoretic or imaginary, or which is so remote and trifling and insignificant, that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of an individual * * * " (opinion, pp. 13, 14). Neither is the interest or bias imputed to the Government employee sitting in such a case comparable to that of "all storeowners and householders in cases of larceny or burglary" (opinion, p. 15). The interest of such as owners of property stolen or persons outraged may well permit their testimony as witnesses on the stand but that such should sit upon juries where their own rights are so closely involved is one of doubtful propriety, to say the least where one is charged with the theft of their property or burglarious entry into their homes. The interest of the employee in cases directly involving the interest of the Government as in the *Crawford* case or the many cases arising each year in our District Court for trial is not "artificial, visionary or trifling." It is real and strikes at the very roots of that impartiality which should be secured for every accused under our form of government with respect to the integrity of our jury system. It is not every case in which a Government employee, perhaps, should be disqualified from service as a juror. No lawyer, perhaps, would fear a trial before twelve Government employees as the jury where, as in this case, the United States has no interest further than to protect the public welfare of its citizens. If the Act went no further, the applicable contention of the respondent might be classi-

fied within the rationale of the *Massachusetts* case cited in this Court's opinion. The vice of the Act is the breadth and scope of its provisions, qualifying and enabling Government employees to sit in all cases in which the United States is a party, whether directly interested or not. No such legislation, striking as it does not at form or procedure, not at rights ceded by the defendant but asserted by him, should be permitted to destroy the very substance and integrity of our jury system which has been guarded so jealously by this Court since the Sixth Amendment was adopted.

Because of the impotence of the defendant if the present Statute is sustained we feel, on the basis of this Court's opinion, that a defendant will have no relief in cases of actual bias or bias so close to actual bias as to amount to a moral certainty of it. We ask, therefore, a re-examination of the present case on this theory.

Respectfully submitted.

ROBERT I. MILLER,
503 D Street, N. W.,
WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
Investment Building,
Washington, D. C.,
Attorneys for Respondent.

I hereby certify that the above petition for rehearing is filed in good faith and not for purposes of delay.

WILLIAM J. HUGHES, JR.

SUPREME COURT OF THE UNITED STATES.

No. 34.—October Term, 1936.

The United States of America, Petitioner, *vs.* Raymond Wood.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[December 7, 1936.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This case presents the question of the constitutional validity of the Act of Congress of August 22, 1935, c. 605, 49 Stat. 682, prescribing qualifications for service as jurors in the District of Columbia, as applied to criminal prosecutions.

The respondent was convicted of petit larceny in the Police Court of the District and was sentenced to imprisonment for 240 days. The larceny was from a private corporation. On his trial twelve prospective jurors were called. Their examination showed that one was the holder of a "bonus certificate"; others were employed as clerks in governmental departments, one in the United States Weather Bureau, another in the Federal Emergency Administration, a third in the Treasury Department, and a fourth in the Navy Yard. Another prospective juror was a housewife who received a civil war pension. Each of these persons was challenged for cause upon the ground of interest in the United States Government. The challenge was disallowed. Counsel for defendant then exhausted his three peremptory challenges and when the jury was finally selected there remained as jurors, despite a reiterated challenge for cause, the recipient of the civil war pension and the two clerks employed in the Treasury Department and the Navy Yard respectively.

The action of the trial court was taken under the Act of August 22, 1935, which provides that persons of this description shall be eligible for jury service.[1] On appeal, the Court of Appeals thus

[1] The provision is as follows:

"All executive and judicial officers of the Government of the United States and of the District of Columbia, all officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard of the United States in active service, those connected with the police and fire departments of the United States and of the District of Columbia, counselors and attorneys at law in actual practice,

stated the occasion for the statute, its purport, and the question it raises:

"Prior to the passage of this statute the provision with relation to the qualifications of a juror was that he should be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, able to read and write and understand the English language, and a person who had never been convicted of a felony or misdemeanor involving moral turpitude. In 1908 the Supreme Court held in Crawford *v.* United States, 212 U. S. 183, that an employee of the United States was not qualified to serve as a member of a petit jury in the District of Columbia in the trial of a criminal case. The effect of the decision and of others of like nature which followed, resulted, it is said, in narrowing the eligible list of jurors in the District to the point where it sometimes became difficult to secure jurors possessing the necessary qualifications. To correct this, Congress extended the list of eligibles to include employees of the United States and of the Dis-

---

ministers of the gospel and clergymen of every denomination, practicing physicians and surgeons, keepers of hospitals, asylums, almshouses, or other charitable institutions created by or under the laws relating to the District of Columbia, captains and masters and other persons employed on vessels navigating the waters of the District of Columbia shall be exempt from jury duty, and their names shall not be placed on the jury lists.

"All other persons, otherwise qualified according to law whether employed in the service of the Government of the United States or of the District of Columbia, all officers and enlisted men of the National Guard of the District of Columbia, both active and retired, all officers and enlisted men of the Military, Naval, Marine, and Coast Guard Reserve Corps of the United States, all notaries public, all postmasters and those who are the recipients or beneficiaries of a pension or other gratuity from the Federal or District Government or who have contracts with the United States or the District of Columbia, shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service: *Provided*, That employees of the Government of the United States or of the District of Columbia in active service who are called upon to sit on juries shall not be paid for such jury service but their salary shall not be diminished during their term of service by virtue of such service, nor shall such period of service be deducted from any leave of absence authorized by law".

This Act amended the prior provision known as Section 217 of the Code of Law for the District of Columbia approved March 3, 1901 (Code D. C. 1929, Tit. 18, sec. 360) which provided:

"*Exemption from jury service.*—All executive and judicial officers, salaried officers of the Government of the United States and of the District of Columbia, all officers and enlisted men of the National Guard for the District of Columbia, both active and retired, and those connected with the police or fire departments, counselors and attorneys at law in actual practice, ministers of the gospel and clergymen of every denomination, practicing physicians and surgeons, keepers of hospitals, asylums, almshouses, or other charitable institutions created by or under the laws relating to the District, captains and masters and other persons employed on vessels navigating the waters of the District shall be exempt from jury duty, and their names shall not be placed on the jury lists".

trict of Columbia, officers and enlisted men of the National Guard and of the Military, Naval, Marine, and Coast Guard Reserve Corps, notaries public, postmasters, and recipients of pensions and gratuities from the United States or the District, as well as those having contracts with the United States or the District; and the question we have to decide is whether this statute, when applied in a criminal case like the present, is in violation of the provisions of the Sixth Amendment guaranteeing to the accused in all criminal prosecutions the right of trial by an impartial jury."

Dealing particularly with the qualification of governmental employees, the court answered this question in the affirmative and reversed the judgment of conviction. 83 F. (2d) 587. Because of the importance of the question we granted certiorari. 298 U. S. 652.

First.—The Sixth Amendment requires that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury". The Amendment prescribes no specific tests. The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law. There is no ground for a contention—and we do not find that such a contention is made—that Congress has undertaken to preclude the ascertainment of actual bias. All persons otherwise qualified for jury service are subject to examination as to actual bias. All the resources of appropriate judicial inquiry remain available in this instance as in others to ascertain whether a prospective juror, although not exempted from service, has any bias in fact which would prevent his serving as an impartial juror. In dealing with an employee of the Government, the court would properly be solicitous to discover whether in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him. No bias of that sort is shown in the instant case.

The question here is as to implied bias, a bias attributable in law to the prospective juror regardless of actual partiality. The contention of the defendant is that there must be read into the constitutional requirement an absolute disqualification in criminal cases of a person employed by the Government,—a disqualification

which Congress is powerless to remove or modify. This contention gives rise to two inquiries—(1) whether, in the practice in England prior to the adoption of the Amendment, or in the colonies, there was an absolute disqualification of governmental employees to serve on juries in criminal cases, and (2) whether, either because of that practice, or in reason, such a disqualification should be regarded as essential to the impartiality of the jury and hence beyond the reach of the legislative power. The Government insists that both questions should be answered in the negative.

Second.—The Government has presented the result of elaborate research to show that throughout the long period from the development of the jury system to modern times, the English common law permitted a servant of the king to serve as a juror in crown cases, provided he had no actual bias.

Challenges at common law were to the array, that is, with respect to the constitution of the panel, or to the polls, for disqualification of a juror. Challenges to the polls were either "principal" or "to the favor", the former being upon grounds of absolute disqualification, the latter for actual bias. The Government quotes the statements of early commentators from Fitzherbert to Hargrave, indicating that a principal challenge was not allowed in crown cases upon the ground that the prospective juror was a servant of the crown, and that a challenge for that reason, if permitted at all, was to the favor.[2] The Government reviews the early cases in support of this conclusion.[3] It is not necessary to set forth these authorities in detail as there seems to be no controversy as to their

[2] Fitzherbert, Abridgement, Challenge, Secs. 17, 63, 65, folios 172, 173 (1577 ed.); Brooke, Abridgement, Challenge, Secs. 154, 155, folio 126; Staunforde, Pleas of the Crown, 162; Coke upon Littleton, I, 156a-156b; Hale, Pleas of the Crown, II, 271; Rolle, Abridgment, II, 645-646; Duncombe, Trials per Pais (9th ed.) pp. 166-167, 175, 189, 196, 203; Hawkins, Pleas of the Crown, II, c. 43, Secs. 32, 33; Bacon, Abridgment, V, Juries, 355; Viner, Abridgments, XXI, Trial, 243; Hargrave's Coke upon Littleton, I, 156; Chitty, Criminal Law, I, 539.

[3] Year Books, 19 Ass. 62, pl. 6, 4 Henry VII, 8, P. pl. 6; 4 Henry VII, 3, H. pl. 5; King *v.* Jenney (1509) Keilw. 97, 72 Eng. Rpt. 261; Rex *v.* Genney (1508) Keilw. 102a, 72 Eng. Rpt. 266; Reg. *v.* Tutchin, 14 St. Tr. 1095, 1101 (1816 ed.); Rex *v.* Hampden (1683) 9 St. Tr. 1054, 1057-1061; Rex *v.* Parkyns (1695) 13 St. Tr. 163; Rex *v.* Rowan (1793) 22 St. Tr. 1034, 1037-1039; Rex *v.* Kirwan (1812) 31 St. Tr. 543; The King *v.* Edmonds (1821) 4 B. & Ald. 471, 106 Eng. Rpt. 1009; Reg. v. Lacey (1848) 3 Cox, Cr. C. 517, 519.

purport. We give in the margin the analysis presented by respondent's counsel.[4] Their resumé is as follows:

"From the above it seems that nineteen authorities hold that there is no principal cause of challenge against a Crown Servant; that twelve authorities hold that there is not even any challenge for favor. Fitzherbert, Coke, and Rex *v.* Hampden, 9 St. Tr. 1054, 1057, 1061, allow challenges for favor in respect of menial servants. Actual malice as distinguished from favor was allowed as a challenge by: Staunforde, Lord Hale, Duncombe, Hawkins, Matthew Bacon, Year Book 19 Ass. 62 Pl. 639, Rex *v.* Genney, Keilw. 102 a, Reg. *v.* Blakeman, 175 Eng. Rpt. 479. Brooke allowed no challenge of any kind for the defendant but challenge of either kind for the king's side".

Respondent's counsel quote from the commentators their statements of the reason why a crown servant was not challengeable,—as that "he should favor the King by reason of his obedience";[5] or, as put by Lord Coke—"because in respect of his allegiance he

[4] Respondent's brief states: "The following gives a rough analysis of the Government's authorities on the right to challenge a King's Servant:

Author:	*Challenge In Principal*	*Challenge To Favor*
Fitzherbert	No	Yes
Chief Justice Brooke	No	No
Staunforde	No	Yes
Coke	No	No
Lord Hale	No	Yes
Chief Justice Rolle	No	Yes
Duncombe	No	No
Hawkins	Doubtful	Doubtful
Matthew Bacon	Doubtful	Doubtful
Viner	No	Yes
Hargrave	No	No
Chitty	Doubtful	Yes
The Cases:		
Year Book (1346) 19 Ass. 62, pl. 6	No	No
Year Book, 4 Henry VII 8, P. pl. 7	No	No
Year Book, 4 Henry VII, 3 H. pl. 5	No	No
Rex *v.* Genney, (1508) Keilw. 102 a	No	No
Reg. *v.* Tutchin, 14 St. Tr. 1095, 1101 (1816)	Doubtful	No
Rex *v.* Hampden, (1683) 9 St. Tr., 1054, 1057-1061	No	Not decided
Rex *v.* Parkyns (1695) 13 St. Tr. No. 163	No	No
Rex *v.* Rowan (1793) 22 St. Tr. 1034, 1037-1039	No	No
Rex *v.* Kirwan, (1812) 31 St. Tr. 543	No	Not decided
King *v.* Edmonds, (1821) 4 B. & Ald. 471, 106 Eng. Rpt. 1009	No	No
Reg. *v.* Lacey, (1848) 3 Cox Cr. C. 517-519	No	Not decided"

[5] Fitzherbert, op. cit. sec. 63.

ought to favor the king more".[6] Hargrave, expressing dissatisfaction with the reason assigned by Lord Coke, observed: "But a better principle to found the rule upon was not unobvious; namely, that from the extensive variety of the king's connections with his subjects through tenures and offices, if favour to him was to prevail as an exception to a juror, it might lead to an infinitude of objections, and so operate as a serious obstruction to justice in suits in which he is a party".[7] The discussion of the reason for the rule affirms its existence.

Whatever the reason, it is manifest, to say the least, that there was no settled practice under the English law establishing an absolute disqualification of governmental employees to serve as jurors in criminal cases. And such a disqualification cannot, upon the ground of such a practice, be treated as embedded in the Sixth Amendment. See *Callan* v. *Wilson*, 127 U. S. 540, 549; *Thompson* v. *Utah*, 170 U. S. 343, 350; *Patton* v. *United States*, 281 U. S. 276, 288; *Dimick* v. *Schiedt*, 293 U. S. 474, 476, 487; *Continental Bank* v. *Rock Island Railway*, 294 U. S. 648, 669; 2 Story on the Constitution, sec. 1791.

We turn to the question whether in the colonies, or in the States at the time of the adoption of the Sixth Amendment, there was such a disqualification. We find no satisfactory evidence to that effect. Counsel for the Government say that the practice in the colonies prior to the adoption of the Federal Constitution "apparently cannot be ascertained". They say that they have searched "the available reports and authorities without finding anything of relevance". The researches of respondent's counsel have not supplied the lack. They urge that, to make the exception applicable, the Government must affirmatively show that the colonists recognized the exception in favor of the king's servants at the time the Sixth Amendment was formulated. But before we can read an absolute disqualification into the Amendment because of a rule obtaining in the colonies different from that obtaining in England we must have proof that there was a different rule. Respondent's contention is based upon a supposed acceptance of Blackstone's statement of the grounds of a principal challenge:

"A *principal* challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or

[6] Coke, op. cit. I, 156a.
[7] Hargrave, op. cit. I, 156.

favour; as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled, for jurors must be *omni exceptione majores*". 3 Bl. Com. 363.

Undoubtedly, as we have frequently said, the framers of the Constitution were familiar with Blackstone's Commentaries. Many copies of the work had been sold here and it was generally regarded as the most satisfactory exposition of the common law of England. *Schick* v. *United States*, 195 U. S. 66, 69. But in this instance we think the point is pressed too far. It will be observed that Blackstone does not refer specifically to the subject now under discussion. His statement has relation to masters and servants of private parties. And, while at another place he makes the general statement that challenges in criminal cases may be made "for the very same reasons that they may be made in civil causes" (4 Bl. Com. 352), he makes no mention in either instance of the practice in crown cases with respect to servants of the crown. Blackstone's failure to refer to that historic exception is obviously not enough to refute the proof of its existence as shown by the affirmative statements of other commentators and the decided cases. We think that his omission to mention the case of crown servants cannot be regarded as a sufficient basis for holding, in the absence of other evidence, that the common law rule was different in the colonies from that in England,—much less that the Congress which proposed the Sixth Amendment, or the state legislatures which ratified it, undertook to establish an absolute disqualification of all governmental employees beyond the control of the congressional power.

Respondent relies upon our decision in *Crawford* v. *United States*, 212 U. S. 183. That was a prosecution in the District of Columbia for conspiracy to defraud the United States in relation to a contract with the Post Office Department. One of the grounds of reversal of the judgment of conviction was the overruling by the trial court of a challenge to a juror who was a clerk in charge of a subpostal station located in a drug store. The Court referred to

the qualifications for jurors prescribed by Section 215 of the Code of Laws for the District and to the provision of Section 217 exempting from jury duty "salaried officers of the Government". Assuming the contention to be sound that the mere fact that a proposed juror was such a salaried officer could be ground only for his own claim of exemption, the Court expressed the opinion that the provisions of the sections of the Code did not embrace the entire subject of the qualifications of jurors; that by the common law there was a further qualification, and that under that law in force in Maryland, and applicable to the District, the court should have held the juror disqualified by reason of his employment. *Id.*, pp. 195, 196. It will be observed that the employment was in the very department to the affairs of which the alleged conspiracy related. But the decision took a broader range and did not rest upon that possible distinction. The Court was not aided by a careful or comprehensive presentation of the English precedents and it was not shown that the courts of Maryland had passed upon the point. The above-mentioned statement of Blackstone was cited for the proposition "that one is not a competent juror in a case if he is master, servant, steward, counsellor or attorney of either party". The Court also cited the decision in *Block* v. *The State*, 100 Ind. 357, 362, which was said to follow that rule of the common law. In that case the juror was a deputy of the prosecuting attorney. The latter, as the state court said, "was, by analogy and for all practical purposes, the plaintiff in the prosecution" and the deputy "had become and was the employee and subordinate of the prosecuting attorney" and therefore "impliedly biased" (*Id.*, p. 364).[8] In the *Crawford* case this Court also referred to the decisions cited in the dissenting opinion in the court below (30 App. D. C., p. 33) to the effect that "a clerk or employé of a private party or of a corporation is not qualified to sit as a juror", and it was said that while the cases cited were civil cases, the rule applied to criminal cases as well.[9] The rule which had obtained in England with respect to the qualifications of servants of the crown to serve as jurors in crown cases was not mentioned and the authorities to which we

[8] See, also, Zimmerman *v.* State, 115 Ind. 129; Gaff *v.* State, 155 Ind. 277; Evans *v.* State, 13 Ga. App. 700; State *v.* Golubski, 45 S. W. (2d) 873.

[9] But see as to various officers held to be qualified, when not found to have actual bias: Jackson *v.* State, 74 Ala. 26, 29 (coroner); Pate *v.* State, 158 Ala. 1, 3 (deputy sheriff); Spittorff *v.* State, 108 Ind. 171, 172 (bailiff); O'Connor *v.* State, 9 Fla. 215, 221, 222 (coroner); State *v.* Adams, 20 Iowa 486 (county supervisor); State *v.* McDonald, 59 Kans. 241, 244 (school district officers); State *v.* Carter, 106 La. 407 (constable); State *v.* Petit, 119

have referred in that relation were not brought to the attention of the Court.

In the light of the English precedents, and in the absence of any satisfactory showing of a different practice in the colonies, we are unable to accept the ruling in the *Crawford* case as determinative here or to reach the conclusion that it was a settled rule of the common law prior to the adoption of the Sixth Amendment that the mere fact of a governmental employment, unrelated to the particular issues or circumstances of a criminal prosecution, created an absolute disqualification to serve as a juror in a criminal case.

Third.—Even if it could be said that at common law such a disqualification existed, we are of the opinion that Congress had power to remove it. That point was not touched in the *Crawford* case. Indeed it was said, referring to the Code of Laws of the District of Columbia, that if the provision of section 215, together with section 217, "were alone to be considered, it might be that the juror was qualified". And, further, in referring to *Block* v. *The State, supra*, the ruling there was summarized as being to the effect "that the Indiana statute upon the qualification of jurors did not strike out the rule of the common law on the subject, when not inconsistent with the statute". The observations of the Court in the *Crawford* case, in the absence of such an act of Congress as that now under consideration, should not be taken as attempting to set up an absolute rule to be applied in the face of specific legislation. The question of legislative power was neither presented nor passed upon.

Whether a clause in the Constitution is to be restricted by a rule of the common law as it existed when the Constitution was adopted depends upon the terms or nature of the particular clause. *Continental Bank* v. *Rock Island Railway, supra.* We have frequently adverted to the firm place which the jury as a fact-finding body holds in our history and jurisprudence. *Dimick* v. *Schiedt, supra*, pp. 485, 486. The Constitution would have been "justly obnoxious to the most conclusive objection" if the right of trial by jury, as the

---

La. 1013 (deputy sheriff); State *v.* Foster, 150 La. 971, 985, 986 (deputy sheriff); Fellows' Case, 5 Maine 287, 288 (constable); State *v.* Wright, 53 Maine 328, 344, 345 (coroner); People *v.* Lange, 90 Mich. 454, 455 (justices of the peace); Glassinger *v.* State, 24 Ohio St. 206 (justice of the peace); State *v.* Cosgrove, 16 R. I. 411 (constable); Burns *v.* State, 12 Tex. Cr. App. 269, 277-8 (deputy sheriff); Mingo *v.* State, 61 Tex. Cr. App. 14, 15 (deputy sheriff); compare Chapman *v.* State, 66 Tex. Cr. App. 489, 491; State *v.* Parker, 104 Vt. 494, 497, 498 (deputy sheriff); Thompson *v.* Commonwealth, 88 Va. 45, 46 (city treasurer and councilman).

bulwark of civil and political liberties, had not been recognized and confirmed "in the most solemn terms". *Id.;* 2 Story on the Constitution, sec. 1779. And the importance of safeguarding the complete integrity of the jury in the full sense of the Constitution is not to be gainsaid.

We have described the essential elements of "trial by jury". In *Patton* v. *United States, supra,* we said that these elements as recognized in this country and England when the Constitution was adopted were "(1) the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous". None of these elements is involved here.

The Sixth Amendment was not needed to require trial by jury in cases of crimes. That requirement is provided by Article III, section 2, paragraph 3. The Sixth Amendment provided further assurances. It added that in all criminal prosecutions the accused shall enjoy the right "to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence". These requirements as to speed, publicity, impartiality, information as to the charge, confrontation with witnesses, compulsory process and assistance of counsel are all of first importance. But it would hardly be contended that in all these matters regard must be had to the particular forms and procedure used at common law. These requirements relate to matters of substance and not of form. And the true purpose of the Amendment can be achieved only by applying them in that sense.

In construing the Seventh Amendment providing for the preservation of trial by jury in suits at common law, and that no fact tried by a jury shall be otherwise reexamined "than according to the rules of the common law", we have said that the aim of the Amendment was "to preserve the substance of the common law right of trial by jury as distinguished from mere matters of form or procedure". *Baltimore & Carolina Line* v. *Redman,* 295 U. S.

654, 657. See, also, *Walker* v. *New Mexico & Southern Pacific R. Co.*, 165 U. S. 593, 596; *Gasoline Products Co.* v. *Champlin Co.*, 283 U. S. 494, 498. We held in *Ex parte Peterson*, 253 U. S. 300, that there was no constitutional obstacle to the appointment by a federal court of an auditor in aid of jury trials although the practice in question had not obtained prior to the adoption of the Constitution either in England or in the colonies in connection with trial by jury. The ruling rested upon the fundamental consideration that "New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right". *Id.*, pp. 309, 310.

This principle of construction has also had notable application to the requirement of trial by jury in criminal prosecutions. In the recent case of *Funk* v. *United States*, 290 U. S. 371, 372, this Court, without the aid of legislative enactment, held that the wife of the defendant on trial for a criminal offence in a federal court was a competent witness in his behalf. The Court overruled cases to the contrary, sustaining the power of the federal courts "to declare and effectuate, upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced". It was deemed to be axiomatic "that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions". *Id.*, p. 383. And what courts can thus do to assure the appropriate growth and adaptation of the law *a fortiori* can be achieved by the action of a competent legislature.

In *Patton* v. *United States*, *supra*, the Court answered in the affirmative a question certified by the Circuit Court of Appeals whether, in case a juror became incapacitated during a trial upon indictment, the defendant and the Government could consent "to the trial proceeding to a finality with eleven jurors" and the defendant could "thus waive the right to a trial and verdict by a constitutional jury of twelve men". The Court said that "it might be conceded, at least generally, that under the rule of the common law the accused was not permitted to waive trial by jury". But the Court did not think it necessary to consider that phase of the matter as "the rule of the common law, whether exclusive or subject to exceptions, was justified by conditions which no longer exist". *Id.*, p. 306. And the Court found no convincing ground for holding

that a waiver of a jury trial was not as effective in the case of felonies as in that of misdemeanors. *Id.*, p. 309.

The Sixth Amendment does not preclude legislation making women qualified to serve as jurors in criminal prosecutions although that was not permitted at common law. *Tynan* v. *United States*, 297 Fed. 177, 178, 179; *Hoxie* v. *United States*, 15 F. (2d) 762. Although aliens are within the protection of the Sixth Amendment, the ancient rule under which an alien might have a trial by jury *de medietate linguae*, "one half denizens and the other aliens",—in order to insure impartiality—no longer obtains.[10] Congress has reduced the number of peremptory challenges of the accused. This number which was "settled by the common law" at thirty-five and fixed by the statute 22 Hen. VIII, c. 14, at twenty (4 Bl. Com. 354) has been reduced in the case of felonies, other than treason or capital offences, to ten. 28 U. S. C. 424; Code D. C., Tit. 6, sec. 366. In *Stilson* v. *United States*, 250 U. S. 583, 586, we said on this point: "There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured. The number of challenges is left to be regulated by the common law or the enactments of Congress". And the same was held to be true of the authority of Congress to treat several defendants, for this purpose, as one party. It is not necessary to multiply illustrations of the familiar principle which while safeguarding the essence of the constitutional requirements permits readjustments of procedure consistent with their spirit and purpose.

Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. State courts enforcing similar requirements of state constitutions as to trial by jury have held that legislatures enjoy a reasonable freedom in establishing qualifications for jury service, although these involve a departure from common law rules. This principle was thus stated by the Court of Appeals of New York in *Stokes* v. *People*, 53 N. Y. 164, 173: "While the Constitution secures the right of trial by an impartial jury, the mode of procuring and impanelling such jury is regulated by law, either common or statutory, prin-

[10] See United States v. Cartacho, Fed. Cas. 14,738; Respublica v. Mesca, 1 Dall. 73; People v. McLean, 2 Johns. 381; Thompson & Merriam on Juries, secs. 16, 17, and cases and statutes there cited.

cipally the latter, and it is within the power of the legislature to make, from time to time, such changes in the law as it may deem expedient, taking care to preserve the right of trial by an impartial jury". And in *Brown* v. *State*, 62 N. J. L. 666, 678, the Court of Errors and Appeals of New Jersey enunciated the same doctrine: "The provision in our constitution (paragraph 8), that the accused should have a right to a speedy and public trial by an impartial jury, secured to the accused a right to a trial by an impartial jury by an express constitutional provision. The means by which an impartial jury should be obtained are not defined. In neither of the constitutional provisions on this subject is there any requirement with respect to challenges, or to the qualifications of jurors, or the mode in which the jury shall be selected. These subjects were left in the discretion of the legislature, with no restriction or limitation, except that the accused should have the right to be tried by an impartial jury".

One of the grounds of principal challenge at common law was that a juror was "related to either party within the ninth degree, though it is only by marriage".[11] It appears that this restriction has been reduced in a number of States to degrees from the third to the sixth.[12] The common law rule with respect to jurors who have formed an opinion upon the subject of the controversy has been liberalized by legislation which meets the essential condition of impartiality while taking account of modern conditions.[13] The disqualification of taxpayers in cases where a municipality is interested has been removed by statute in many States.[14] In *Commonwealth* v. *Reed*, 1 Gray 472, the court held that action of that sort was not a violation of the Massachusetts Declaration of Rights securing to every citizen "the right to be tried by judges as free, impartial and independent, as the lot of humanity will admit". The court thought that an exemption "from an interest which is only theoretic or imaginary, or which is so remote and trifling and insignificant, that it may fairly be supposed to be in-

[11] Chitty, op. cit. I, 541; Coke, op. cit. 157a; 3 Bl. Com. 363.

[12] See, for example, the provisions of state codes or general laws in Alabama, sec. 8610; Arkansas, sec. 6334; Florida, sec. 4359; Indiana, sec. 9-1504-4; Louisiana, Art. 507 (1); Missouri, sec. 8771; Tennessee, sec. 10007; Vermont, sec. 1237.

[13] See Stokes *v.* People, *supra;* Spies *v.* Illinois, 123 U. S. 131, 167-169; Hopt *v.* Utah, 120 U. S. 430, 433-435.

[14] Coke, op. cit. I, 157a, 157b; Wood *v.* Stoddard, 2 Johns. 194; Diveny *v.* City of Elmira, 51 N. Y. 506, 509, 510; Thompson and Merriam, op. cit. sec. 179.

capable of affecting the judgment or of influencing the conduct of an individual, is not essential". And referring to the particular contention as to the interest of a taxpayer of a town in the penalties demanded, the court added: "Such an interest as arises from that cause is remote and minute; and it may well devolve upon the legislature to determine if it ought to disable an otherwise impartial citizen from serving in the capacity of a juror. The rule established by such authority must, in general, be the guide by which courts of law will be controlled".

The ultimate question is not whether Congress has changed a common law rule, but whether, in reason, an absolute disqualification of governmental employees to serve as jurors in criminal cases is essential to the impartiality of the jury. The Government stresses the factual situation in the District of Columbia before the enactment of the statute before us. Respondent replies that a large proportion of governmental employees are in any event disqualified because of legal residence elsewhere. But after making every allowance for that class, it is still true that in the District of Columbia there is a numerous body of persons[15] who, except for the fact of governmental employment, would be eligible for service as jurors and whose service, by reason of their intelligence and character, would be highly desirable. That fact is emphasized by the congressional committees which recommended the passage of the Act.[16] They stated, after referring to the exemptions then existing: "These exemptions take from those who would otherwise be qualified some of the best jurymen available and makes the empanneling of a jury much more difficult". The bill was recommended by the bar association of the district, by the district commissioners and by the corporation counsel.[17] It is manifest that the Act was passed to meet a public need and that no interference with the actual impartiality of the jury was contemplated. The enactment itself is tantamount to a legislative declaration that the prior disqualification was artificial and not necessary to secure impartiality.

[15] The court below estimates that "In the District of Columbia more than a hundred thousand government employees will be qualified as jurors if the statute is valid". 83 F. (2d) p. 592.

[16] H. R. Rep. No. 1421; Sen. Rep. No. 1297; 74th Cong., 1st sess.

[17] Cong. Rec., 74th Cong., 1st sess., Vol. 79, pt. 12, p. 13401. The bill was drafted by a committee consisting of the president of the district bar association, the president of the Federation of Citizens' Associations, the chairman of the Traffic Committee of the Board of Trade, the president of the Federation of Civic Associations, a member of the Public Utilities Commission, and representatives of the district government. Sen. Rep. No. 1347.

Why should it be assumed that a juror, merely because of employment by the Government, would be biased against the accused? In criminal prosecutions the Government is acting simply as the instrument of the public in enforcing penal laws for the protection of society. In that enforcement all citizens are interested. It is difficult to see why a governmental employee, merely by virtue of his employment, is interested in that enforcement either more or less than any good citizen is or should be. The instant case is a good illustration. The accused was on trial for theft from a store of a private corporation. Can it be seriously urged that to assure an impartial jury for his trial it is necessary to segregate governmental employees from other citizens of the District upon the theory that the former are biased against him? What possible interest in such a case has a governmental employee different from that of any citizen who wishes to see crime properly punished but is free from any actual bias against the alleged offender? And what appears to be so obviously true in this case of larceny would be true also in criminal prosecutions in general, running the gamut of offences from murder, burglary and robbery to cheats and disturbances of the peace. We think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation.

It is said that particular crimes might be of special interest to employees in certain governmental departments, as, for example, the crime of counterfeiting, to employees of the treasury. But when we consider the range of offenses and the general run of criminal prosecutions, it is apparent that such cases of special interest would be exceptional. The law permits full inquiry as to actual bias in any such instances. We repeat, that we are not dealing with actual bias and, until the contrary appears, we must assume that the courts of the District, with power fully adequate to the occasion, will be most careful in those special instances, where circumstances suggest that any actual partiality may exist, to safeguard the just interests of the accused. While bias, as has been said, is "an elusive condition of the mind", that consideration affords no ground for extreme and fanciful tests. To impute bias as matter of law to the jurors in question here would be no more sensible than to impute bias to all storeowners and householders in cases of larceny or burglary.

It is suggested that an employee of the Government may be apprehensive of the termination of his employment in case he decides in favor of the accused in a criminal case. Unless the suggestion be taken to have reference to some special and exceptional case, it seems to us far-fetched and chimerical. It does not rise to the dignity of an argument to be addressed to the power of Congress to provide a reasonable scheme with respect to the qualifications of jurors. It belongs in the category of "theoretic or imaginary" interests—"remote" and "insignificant" as described in the Massachusetts case above cited.

Nor are we impressed with the contention that the qualification of governmental employees for jury service in criminal cases in the District of Columbia will impair the public respect in which the processes of the law should be held. On the contrary, we think that the spectacle of the exclusion *en masse* from that service of a body of citizens otherwise highly desirable in point of intelligence and character—solely by reason of their employment by the Government—and the imposition in consequence of a heavier burden upon other citizens, whether that exclusion would be in deference to a supposed ancient rule or because of a conclusive presumption of bias against an accused, would constitute a serious reproach to the competency and efficiency of the administration of the system of jury trials.

What has been said applies with equal force to the provisions of the statute qualifying those who receive governmental pensions and gratuities.

Fourth. Respondent also raises the question of the validity of the statute under the due process clause of the Fifth Amendment. For the reasons already given, we find nothing arbitrary or capricious in the legislative action.

The judgment of the Court of Appeals is reversed and the judgment of conviction is affirmed.

It is so ordered.

Mr. Justice McREYNOLDS, Mr. Justice SUTHERLAND, and Mr. Justice BUTLER are of opinion that the case is controlled by our decision in *Crawford* v. *United States*, 212 U. S. 183, and that the rule there laid down should not now be departed from. They think the opinion of the court below is sound, and that its judgment should be affirmed.